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Supreme Court of the United States

OCTOBER TERM, 1948

No. 9

CHARLES KOVACS, APPELLANT,

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED DECEMBER 30, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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CHARLES KOVACS, APPELLANT,

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

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[fol. 1] **IN SUPREME COURT OF NEW JERSEY**

WRIT OF CERTIORARI

NEW JERSEY, ss.:

The State of New Jersey to Albert Cooper, Jr., Judge of the First District Police Court of Trenton: (Seal.)

We, being willing, for certain reasons to be certified of and concerning an accusation in writing, and the proceedings at the trial and judgment of conviction brought before Honorable Albert Cooper, Jr., Judge of the First District Police Court of Trenton, against Charles Kovacs, on the 23d day of August, 1946, for the violation of an Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise," passed August 8, 1946, as is said, do command you that the said accusation in writing, proceedings at the trial, including the testimony taken and judgment of conviction and penalty, with all things touching and concerning the same, together with this writ, you distinctly and openly send, under your hand and seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the first day of October, 1946, next, that our Justices may cause thereon to be done what of right and according to the laws and constitution of this State should be done.

Witness, Honorable Clarence E. Case, Chief Justice of our Supreme Court of Judicature at Trenton, this 9th day of September, 1946.

James J. Gavin, Clerk.

George Pellettieri, Attorney for Prosecutor.

ALLOCATUR

This writ is allowed. Let it be sealed.

A. Dayton Oliphant, J. S. C.

Sept. 9th, 1946.

[fol. 2] IN SUPREME COURT OF NEW JERSEY

CHARLES KOVACS, Prosecutor,

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON, Respondent.

On Certiorari

RETURN OF RECORD OF POLICE COURT—Filed September 26, 1946

I, Rudolph A. Socey, Clerk of the Police Court of the City of Trenton, do herewith send to the Supreme Court of the State of New Jersey, the complaint, conviction, sentence and all proceedings had before the Police Court of the City of Trenton, in the County of Mercer and State of New Jersey, wherein the Judge of the said Police Court tried and determined the complaint made and filed against the aforenamed Charles Kovacs of the charge of the violation of Section 4 of the ordinance of the City of Trenton entitled "An Ordinance to prohibit the making of unnecessary noise," together with all papers and things touching and concerning the same, as by the writ of certiorari sealed the 9th day of September, 1946, before the Honorable A. Dayton Oliphant, Justice of the Supreme Court, I am commanded to do.

I certify that I am the Clerk of the Police Court of the City of Trenton, and that the following are true copies of all papers, documents, etc., of the said Police Court of the City of Trenton, and that together they constitute the entire record of the proceedings in the above entitled action.

[fol. 3] Signed this 12th day of September, 1946, and sealed with the seal of the Police Court of the City of Trenton.

Rudolph A. Socey, Clerk of the Police Court of the City of Trenton.

ORDINANCE COMPLAINT

STATE OF NEW JERSEY,
County of Mercer, ss.:

On this 23rd of August, 1946, Patrl. V. Domanski, personally appeared before me the Police Justice of the City of Trenton, and upon his oath complains that at the City of Trenton, on August 22, 1946, Charles Kovacs did violate the 4th Section of an Ordinance of the City of Trenton, No. 430, entitled "An Ordinance to prohibit the making of unnecessary noise", in that he did, on South Stockton Street, in said City, play, use and operate a device known as a sound truck, (See Regulatory Ordinances of the City of Trenton, Section—). He therefore prays that the defendant may be apprehended and held to answer said complaint and be further dealt with as the law directs.

Ptl. V. Domanski, Complainant.

Sworn and subscribed to before me the day and year first above written. Rudolph A. Socey, Police Court Clerk.

Plea—Not Guilty. Date of Plea ——. Disposition $50.00. A. C. Jr.

[fol. 4] TRENTON POLICE COURT, NO. 1

Before: Albert Cooper, Jr., Police Justice of the City of Trenton, County of Mercer and State of New Jersey

PATRL. V. DOMANSKI, Prosecutor,

vs.

CHARLES KOVACS, Defendant

CONVICTION

STATE OF NEW JERSEY,
County of Mercer,
City of Trenton, ss.:

Be it remembered, that before me, the subscriber, the Police Justice of the City of Trenton, County of Mercer and State of New Jersey, on the 23rd day of August, 1946, A.D., personally appeared one Patrolman V. Domanski, of the First District Police, who made complaint in writing under

oath, that at the said City of Trenton, and within the jurisdiction of said Court, one Charles Kovacs did violate the 4th Section of an Ordinance of the City of Trenton, No. 430, entitled "An Ordinance to prohibit the making of unnecessary noise", in that he did, on South Stockton Street, in said City, play, use and operate a devise known as a sound truck and the said complaint having been first filed in my office, and said defendant having been brought before me on the 23rd day of August, 1946, A. D., in order that [fol. 5] he might make his defense against the said complaint; and the said complaint having been then and there read to him, and he being asked how he pleaded to said charge, through his counsel George Pellettieri, Esq. did demur, moving for a dismissal of the complaint on the ground that the ordinance upon which it was based was unconstitutional, giving his grounds and reasons therefor, which motion was denied, whereupon the attorney for said defendant entered a plea of Not Guilty to the offense aforesaid,

The offense being triable by law before said Police Court, of said City of Trenton, and the defendant having made application in writing, consenting and requesting to be tried before said Police Court immediately, waiving indictment and trial by jury for said offense.

The following named witnesses being sworn at said trial in open Court, testified on behalf of the State, as follows: Patrolman Domanski, who testified that he was on his post in the vicinity of Hanover and N. Stockton Streets, when he heard a sound truck broadcasting music. That he went in the direction of said sound and located said truck on the Stockton Street side of the Municipal Building. That as he approached said truck, the music stopped and he heard a man's voice broadcasting from said sound truck. That he thereupon went over to said truck, informing the occupants, the driver and Charles Kovacs, the defendant, that they were violating the sound ordinance of the City. That he then placed the defendant, Charles Kovacs, and the driver, Paul Nagy, under arrest. On behalf of the defendant, as follows: The defendant, Charles Kovacs, who admitted that he was the person who set the mechanism in said truck [fol. 6] playing music, and that he did speak into the sound mechanism set up in said truck on South Stockton Street.

Whereupon, I, the said Police Justice, having heard all the testimony offered on behalf of both the State and the

said Charles Kovacs, defendant, and upon considering said evidence and being satisfied of the guilt of the said defendant, I do convict him, the said Charles Kovacs, defendant, of the offense charged against him in said complaint, and I do, therefore, adjudge and order that the said defendant, for his said offense should pay a fine of fifty dollars.

In witness whereof, I, the said Albert Cooper, Jr., Police Justice, to this record of conviction have set my hand and affixed the seal of said Court, No. 1, at the City of Trenton aforesaid, this 12th day of September, 1946, A.D.

Albert Cooper, Jr., Police Justice. (Seal.)

Endorsed on back: Conviction. Dated ——, 19— A.D.

[fol. 7] ORDINANCE

AN ORDINANCE TO PROHIBIT THE MAKING OF UNNECESSARY NOISE

The Board of Commissioners of the City of Trenton, New Jersey, do ordain:

1. That it is hereby declared to be a nuisance and it shall be unlawful for any person, firm or corporation to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him or it, or upon any public street, alley or thoroughfare in the City of Trenton, any unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of said city, or any number thereof.

2. That it shall be unlawful for any person, firm or corporation to play, use, operate or permit to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the production or reproduction of sound with louder volume than is necessary for convenient hearing of the person so playing, using or operating such instrument or device and such persons who are voluntary listeners thereto, or in such manner as to disturb the peace, quiet and comfort of neighboring inhabitants. Nothing herein contained shall be construed to

prohibit playing by a band or orchestra in a hall, building or in the open air.

3. That it shall be unlawful for any person, firm or corporation for advertising purposes or for the purpose of attracting the attention of the passing public, to play, use, [fol. 8] operate, or permit to be played, used or operated any radio receiving set, musical instrument, phonograph, loud speaker, sound amplifier, or other machine or device for the producing or reproducing of sound on the streets or public places of the City of Trenton or in any place where the sound therefrom is cast directly upon the streets or public places, or which is so placed and operated that the sound therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public place, or of persons in neighboring premises.

4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned.

5. That it shall be unlawful for any person, firm or corporation to sound any horn or warning device on any automobile, motorcycle, bus or other vehicle, except when required by law, or when necessary to give timely warning of the approach of the vehicle or as a warning of impending danger to persons driving other vehicles or to persons upon the street. No person shall sound any horn or warning device on any automobile, motorcycle, bus or other vehicle which shall emit an unreasonably loud or harsh sound, or [fol. 9] for any unnecessary or unreasonable period of time.

6. That any person, firm or corporation who shall violate any of the provisions of this ordinance shall upon conviction thereof be punished by a fine of not to exceed two hundred ($200.00) dollars, or by imprisonment in the county jail for a period of not to exceed ninety (90) days, or by

both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated shall be deemed and taken to be a separate and distinct offense.

7. That all ordinances and parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed, but only to the extent of such conflict or inconsistency, and this ordinance shall be in full force and effect immediately upon its adoption and its publication, as provided by law.

8. Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

I hereby certify that this is a true copy.

Dated Trenton, N. J., September 6, 1946.

T. J. Burns, City Clerk, AG H.

[fol. 10] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

REASONS—Filed September 18, 1946

The Prosecutor, Charles Kovacs, presents the following reasons for setting aside his conviction and sentence by Albert Cooper, Jr., Judge of the First District Police Court of Trenton, and brought before this Honorable Court by the Writ of Certiorari in the above case:

1. That the Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, was unconstitutional because it violates Article 1, Paragraph 1 of the New Jersey Constitution, in that, it deprives him of certain natural and unalienable rights which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and of pursuing and obtaining safety and habits.

2. That the Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, was unconstitutional because it violated Article 1, Paragraph 5 of the New Jersey Con-

stitution in that it deprived Deponent of his rights to free-[fol. 11] dom of speech and press and freedom to communicate information and opinions to others.

3. That the Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, is unconstitutional because it violated Article 1, Paragraph 18, in that it deprived Deponent of his rights to freedom of assembly.

4. That the Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, is unconstitutional because it violated Section 1 of the 14th Amendment of the United States Constitution in that it deprived Deponent of his rights of freedom of speech, freedom of assemblage and freedom to communicate information and opinions to others.

5. That the Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, is so obscure, vague and indefinite as to make it impossible of reasonable interpretation and, therefore, is unconstitutional as violative of Section 1, Article 1 of the Constitution of New Jersey.

6. The Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, is so obscure, vague and indefinite as to make it impossible of reasonable interpretation and, therefore, is unconstitutional as violative of the 14th Amendment of the Constitution of the United States.

7. The Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" [fol. 12] passed August 8, 1946, is unconstitutional in that it does not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment in violation of the 14th Amendment

to the Constitution of the United States guaranteeing due process of law.

8. The Ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, is unconstitutional in that it does not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment in violation of Section 1, Article 1 and Section 1, Article 4 of the New Jersey Constitution.

9. The said ordinance of the City of Trenton entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" passed August 8, 1946, is unconstitutional in that it deprives deponent, under color of law, of the privileges [fol. 13] and immunities secured by the Constitution of the United States and the Constitution of the State of New Jersey and the right secured by the Laws of the United States and the Laws of New Jersey and of the rights of all persons within the jurisdiction of the United States and the State of New Jersey.

Prosecutor was illegally convicted under an Ordinance which is unconstitutional and, therefore, void.

George Pellettieri, Attorney for Prosecutor.

Served September 18, 1946.

[fol. 14] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF ARGUMENT—Filed September 25, 1946

SIR:

Take Notice of the argument of the issue joined in this cause, before the Supreme Court of New Jersey, to be held at the State House Annex, in the City of Trenton, State of New Jersey, on the first Tuesday of October, next,

at ten o'clock in the forenoon, or as soon thereafter as the Court can attend to the same.

Yours respectfully, George Pellettieri, Attorney for Prosecutor.

Dated: September 23, 1946.
To Louis Josephson, Attorney of Respondent.
Served September 24, 1946.

[fol. 15] In Supreme Court of New Jersey, Oct. Term, 1946

No. 258

Charles Kovacs, Prosecutor,

v.

Albert Cooper, Jr., Judge of the First District Police Court of Trenton, Respondent

Before Justices Bodine, Perskie and Wachenfeld

Opinion—Filed December 30, 1946

The opinion of the court was delivered by Wachenfeld, J.:

This writ of certiorari brings up for review prosecutor's conviction by the Police Court of the City of Trenton upon a complaint charging him with violating the fourth section of an ordinance of the City of Trenton entitled "An Ordinance to Prevent the Making of Unnecessary Noise."

The facts are undisputed that on August 22, 1946 prosecutor set an amplifier on a truck and while driven by another on South Stockton Street in the City of Trenton, first played music and then spoke through the sound amplifier. There is no testimony in the record to indicate the purpose or the subject of this speech, although prosecutor's brief states he was using the sound apparatus to comment on a labor dispute then in progress in Trenton. He was tried and convicted in the Trenton Police Court on the following day upon a complaint charging a violation of Section 4 of the aforesaid ordinance and fined $50 in accordance with Section 6 thereof.

[fol. 16] Section 4 of the ordinance reads as follows:

"That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

Section 6 of the said ordinance, dealing with the penalty provisions, reads as follows:

"That any person, firm or corporation who shall violate any of the provisions of this ordinance shall, upon conviction thereof, be punished by a fine of not to exceed two hundred ($200) dollars, or by imprisonment in the County Jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated, shall be deemed and taken to be a separate and distinct offense."

The sole question presented to this court by the prosecutor is the constitutionality of the ordinance. Two grounds on which it is attacked are, first, that it deprives the prosecutor of his rights to freedom of speech and freedom to communicate information and opinions to others and freedom of assembly in violation of Article 1, Paragraph 5, [fol. 17] and Article 1, Paragraph 18, of the New Jersey Constitution and Section 1 of the Fourteenth Amendment of the United States Constitution; second, that the provisions of the ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of Article 1, Section 1, of the Constitution of New Jersey and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The relevant provisions of the ordinance apply only to (1) vehicles (2) containing an instrument in the nature of a sound amplifier or any other instrument emitting loud and raucous noises and (3) such vehicle operated or standing upon the public streets, alleys or thoroughfares of the city. The problem raised is novel in this jurisdiction. The court in *Evening Times Printing and Publishing Company* v. *American Newspaper Guild, et al.*, 124 N. J. Eq. 71, raised but passed over the question of the legality *per se* of the use of sound trucks with broadcasting amplifiers. In that case, it should be noted, there was no municipal ordinance involved and the complainant only sought to enjoin misrepresentations and not all broadcasting through the amplifier.

The purpose of the legislation is clear. The conduct proscribed by this ordinance constitutes a potential nuisance. The attention of motorists is diverted from the efficient operation of their vehicles while that of pedestrians is almost involuntarily attracted to the source of the noise. Thus new traffic hazards are added to the ever-increasing dangers of city thoroughfares. Hence, the purpose of the ordinance is founded in reason.

The freedoms of expression and assembly of the prosecutor may have been prohibited in this respect, but the ordinance leaves untouched the right of the prosecutor [fol. 18] to express his views orally without the aid of an amplifier.

While the freedoms of speech and assembly are enunciated and preserved by the New Jersey and United States Constitutions, these freedoms are not absolute but may be curtailed under a reasonable exercise of the police power where the public health, safety and general welfare of the municipality demand.

In *Cox* v. *New Hampshire*, 312 U. S. 569, 61 Sup. Ct. 762, the United States Supreme Court considered the constitutionality of a state statute prohibiting a "parade or procession" upon a public street without a special license. In upholding the validity of the statute the court pointed out the position of civil liberties in organized society and said:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be

lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in [fol. 19] ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

In Hague *v.* Congress of Industrial Organizations, 307 U. S. 496, 59 Sup. Ct. 954, while declaring unconstitutional an ordinance of the City of Jersey City which sought to license through the director of public safety meetings in the streets, parks and public places, the Supreme Court pointed out the same principal of ordered liberty in the following words:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

"The privilege of a citizen of the United States to use the streets and parks for communication of views on

national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and con- [fol. 20] venience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied."

The freedom of speech and assembly to which the prosecutor is entitled are not restricted except to benefit the general welfare and in such a manner that the "opportunities for the communication of thought and the discussion of public questions" are not substantially curtailed. Such regulation cannot be deemed a violation of the constitutional guaranties to which the prosecutor is generally entitled.

The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen. The means of expression through a sound amplifier is tantamount to compulsion. The booming voice of a speaker in crowded thoroughfares of the city forcibly attracts the attention of almost all within a wide area. That alleged right was never intended to be guaranteed by either Constitution.

While there are no decisions in this jurisdiction concerning anti-noise ordinances, there are others which indicate a municipality may exercise its police power for the benefit of the public health, safety and general welfare even though such exercise might result in the regulation of constitutional liberties and deprivation of certain rights. In *Atlantic City* v. *France*, 75 N. J. L. 910, this court held valid an ordinance prohibiting the emission from smokestacks of dense smoke containing soot in sufficient quantities to fall upon the surface of the city. Similarly, in *Schwarz Bros. Co.* v. *Board of Health*, 84 N. J. L. 735, an ordinance relating to the removal of dead animals from the public streets of Jersey City was held constitutional. An ordi- [fol. 21] nance regulating parking was upheld in *Welsh* v. *Morristown*, 98 N. J. L. 630. This State has unhesitatingly permitted the regulation of various types of business enterprises where required by the public welfare. *Falco* v. *Atlantic City*, 99 N. J. L. 19 (barber shop); *Wagman* v. *Trenton*, 102 N. J. L. 492 (public auctions); *Spiro Drug Service* v. *Union City*, 130 N. J. L. 1, aff'd 130 N. J. L. 496 (drug store); *Starkey* v. *Atlantic City*, 132 N. J. L. 27 (drug

store); *Amodio* v. *West New York*, 133 N. J. L. 220 (barber shop).

Other jurisdictions have approved anti-noise ordinances. *Brachey v. Maupin*, 277 Ky. 467, 126 S. W. (2d) 881; *Maupin* v. *Louisville, et al.*, 284 Ky. 195, 144 S. W. (2d) 237; *Hamilton* v. *Montrose*, 109 Colo. 228, 124 P. (2d) 757.

There is no merit to the contention that the ordinance is so obscure, vague and indefinite as to violate Section 1, Article 1, of the New Jersey Constitution and the Fourteenth Amendment of the Federal Constitution.

Only Section 4 of the ordinance, upon which the prosecutor was convicted, is relevant. In simple, unambiguous language it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint. The phraseology of the statute should leave no doubt in the mind of anyone of common intelligence as to what is forbidden.

Its provisions are not unreasonable or oppressive but, on the contrary, are logical and advisable and its enforcement will give to the public at least a modicum of peace and quiet to which it is entitled.

Judgment affirmed with costs.

Mr. Justice Perskie dissents.

[fol. 22] In Supreme Court of New Jersey

Charles Kovacs, Prosecutor-Appellant,

vs.

Albert Cooper, Jr., Judge of the First District Police Court of Trenton, Defendant-Respondent

On Certiorari from Police Court of the City of Trenton

Affirmance and Remittitur—Filed January 13, 1947

This cause having been brought to a hearing on a writ of certiorari from the Trenton Police Court at the October term, 1946, of this Court, and the Court having heard George Pellettieri, Esquire, of Counsel with the Prosecutor, and Louis Josephson, Esquire, of Counsel with the Respondent, and having duly considered the questions brought up by this writ;

It is, on this 13th day of January, 1947, on motion of Louis Josephson, Esquire, of Counsel with the Respondent, ordered, adjudged and decreed that the judgment of conviction of the Trenton Police Court made on the 23rd of August, 1946, from which the Prosecutor appealed, by virtue of said writ, be and the same is hereby affirmed, and that the writ of certiorari heretofore allowed in this cause be and the same is hereby dismissed with costs;

It being further ordered that the record in this cause be remitted to the Trenton Police Court for further proceedings thereon according to the law and practice of that Court.

On Motion of Louis Josephson, Counsel for Respondent.

[fol. 23] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL AND GROUNDS—Filed January 14, 1947

To: Louis Josephson, Esquire and John A. Brieger, Esquire, Attorneys for Respondent:

SIRS:

Take notice that the prosecutor, Charles Kovacs, appeals to the Court of Errors and Appeals in the Last Resort in all Causes from the whole of judgment entered in the Supreme Court in this cause on the following grounds:

The Supreme Court erred in affirming the judgment of conviction of the defendant, Charles Kovacs, entered in the First District Police Court of the City of Trenton.

George Pellettieri, Attorney for and of Counsel with Prosecutor.

Served January 14, 1947.

[fols. 24-25] IN NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES KOVACS, Prosecutor-Appellant,

vs.

ALBERT COOPER, JR., Judge of the First District, Police Court of Trenton, Defendant-Respondent

On Appeal from the Supreme Court

NOTICE OF ARGUMENT—Filed January 15, 1947

To: Louis Josephson, Esquire and John A. Brieger, Attorneys for Respondent:

SIRS:

Please take notice, that we shall move the argument of the above entitled cause before the New Jersey Court of Errors and Appeals at the Court Room of said court, in the State House Annex Building, in the City of Trenton, New Jersey, on Tuesday, February 4, 1947, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Yours, etc., George Pellettieri, Attorney for and of Counsel with Prosecutor-Appellant.

Dated: January 6, 1947.

Served January 14, 1947.

[fol. 26] IN NEW JERSEY COURT OF ERRORS AND APPEALS, FEBRUARY TERM, 1947

No. 27

CHARLES KOVACS, Prosecutor-Appellant,

vs.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton, Defendant-Respondent

Submitted February Term, 1947.

On Appeal from New Jersey Supreme Court.

For Prosecutor-Appellant, George Pellettieri, of Trenton.

For Defendant-Respondent, Louis Josephson and John A. Brieger, both of Trenton.

The judgment of the Supreme Court was affirmed by reason of an evenly divided vote (6-6) of the Court of Errors and Appeals.

OPINION—Filed April 24, 1947

The following opinion sets forth the writer's reasons for a reversal of the Supreme Court judgment:

EASTWOOD, J.:

Prosecutor-Appellant was convicted in the Police Court of the City of Trenton for a violation of the fourth section of an Ordinance of the City of Trenton, entitled "An Ordinance to Prevent the Making of Unnecessary Noise." On certiorari, the judgment of conviction was affirmed.

The factual minutiae reveal that prosecutor-appellant, on August 22, 1946, placed what is commonly known as an amplifier on a sound truck driven by another on South Stockton Street in the City of Trenton, and employed the device both for playing music and speaking through the sound amplifier. Although the record is barren as to the purpose or subject matter of prosecutor-appellant's discourse, it is stated in the brief filed on his behalf that his comments were made in relation to a labor dispute then in [fol. 27] progress in Trenton. On August 23, 1946, prosecutor was tried and convicted by defendant-respondent, sitting as Judge of the Trenton Police Court, who imposed a fine of $50. upon prosecutor-appellant under the provisions of Section 6 of the Ordinance in question.

The question presented for judicial determination is the constitutionality of the Ordinance. It is claimed by prosecutor-appellant that the challenged Ordinance deprives him of various unalienable rights, among which are freedom of speech and freedom to communicate information and opinions to others, and freedom of assembly guaranteed to him by Article 1, Paragraph 5, and Article 1, Paragraph 18, of the New Jersey Constitution, and Section 1 of the Fourteenth Amendment of the United States Constitution; also that the provisions of the Ordinance are obscure, vague and indefinite in that they are impossible of reasonable interpretation, and, therefore, in violation of Article 1, Section 1, of the New Jersey Constitution, and Section 1

of the Fourteenth Amendment of the United States Constitution. In defense of the Ordinance it is maintained that the municipality had full and ample authority to enact the challenged legislation in its lawful exercise of its inherent Police Power; and further, that the provisions of the Ordinance are not obscure, vague and indefinite; and that, therefore, the ordinance in question is constitutional and the conviction of prosecutor-appellant thereunder was proper.

That portion of the Ordinance under attack provides as follows:

"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said street or public places aforementioned."

[fol. 28] That freedom of speech and the right freely to communicate one's information and opinions to others, and the right freely to assemble, are guaranteed to the individual under the Constitutions of this State and of the United States, are principles so well established as to admit of no dispute. Likewise the authority of a municipality to employ its inherent police powers to the end that good government, order and the protection of persons and property and for the preservation of public health, safety and welfare of its inhabitants, in exercise of such powers is a principle that is not open to challenge. It is thus apparent that individual privileges under the constitutional guarantees and the police powers of the municipality for the protection of the public welfare, are relative rights, not to be arbitrarily asserted nor unqualifiedly insisted upon. Both must be so construed so as to effect a nicety of balance to the end that the rights of the individual and those of the public at large may be brought into harmonious rapprochement. The right or privilege of free speech or publication, guaranteed by the constitutions of the United States and of the several states, has its limitation. The right is not an

absolute one and although limitations upon such rights may not be made except in exceptional cases, the constitutional prohibition against freedom of speech was not intended to give immunity for every use or abuse of language. Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625. The right of freedom of speech is guaranteed by the provision of our constitutions both state and federal, and it has ever been the effort of the government and the courts to uphold and maintain it under proper and reasonable restriction. State v. Klapprott; et al., 127 N. J. L. 395, 22 A. 2d 877. The foregoing authorities are representative of a host of decisions affirming those unalienable rights constitution-[fol. 29] ally guaranteed to the individual. On the other hand, it has been held time and time again, by authorities of equal weight and importance, that municipalities may enact regulations in the interest of the public safety, health, welfare and convenience so long as these regulations do not abridge the individual liberties secured by the State and Federal Constitutions. Schneider v. State of New Jersey, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146; Hague v. Congress of Industrial Organizations, 307 U. S. 496; Cantwell v. Connecticut, 310 U. S. 296.

The right of a municipality to enact ordinances in furtherance of its inherent police powers finds statutory expression in the provisions of R. S. 40:48-2, which provides as follows:

"Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." Specifically, under the general heading of ordinances, the governing body of every municipality may make, amend, repeal and enforce ordinances to:

"Auctions and noises. 8. Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises;" R.S. 40:48-1.

Addressing our attention to the language of the challenged Ordinance, it is clear that its effect is to outlaw and prohibit in toto any use of "any device known as a sound truck, loud speaker or sound-amplifier, * * * on or upon the public streets, alleys or thoroughfares in the City of Trenton, * * *". It prohibits such use "for advertising purposes, or for any other purpose whatsoever, * * *". [fol. 30] The decision below was grounded on the reasoning that the purpose of the legislation in question was to proscribe by the Ordinance a potential nuisance. (See Kovacs v. Cooper, Judge, 135 N. J. L. 64, 50 A. 2d 451.) That holding we conclude was erroneous. It is difficult to conceive, and we do not perceive in what manner and by what means the use of a sound truck or an amplifying device thereon, when properly regulated and confined as to the time, area and extent of its use, is, per se, a nuisance. Conceivably an unlimited and unrestricted use of such device might result in the creation of a nuisance, but when reasonably limited and restricted might well be considered as a proper and permissible mode and means of conveying information and opinions beneficial to the public at large. It appears to us, and we so hold, that the primary aim of Section 4 of the Ordinance, under review, is to prohibit "loud and raucous noises", at all times and in all places in the City of Trenton, emanating from sound trucks, loud speakers, sound amplifiers, radios or phonographs, equipped with loud speakers or sound amplifiers, or other similar instruments. It is thus clear that Section 4 of the Ordinance is not regulatory within a proper exercise of the police power of the municipality. As stated in Hague v. Congress of Industrial Organizations, supra, "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied." Section 4 of the challenged Ordinance seeks to impose precisely the type of municipal regulation condemned in Hague v. Congress of Industrial Organizations. Section 4 is thus constitutionally repugnant. As such, it cannot stand.

[fol. 31] So far as we are able to ascertain, the precise question before us has not been judicially determined in

this State. The case of Atlantic City v. France, 75 N. J. L. 910, 70A. 163 (upholding an ordinance prohibiting the emission of dense smoke from smoke stacks); Schwarz Bros. Co. v. Board of Health of Jersey City, 84 N. J. L. 735, 87 A. 463 (relating to the removal of dead animals from public streets); Welsh v. Morristown, 98 N. J. L. 630, 121 A. 697 (regulating parking); Falco v. Atlantic City, 99 N. J. L. 19, 122 A. 610 (barber shop); Wagman v. Trenton, 102 N. J. L. 492, 134 A. 115 (public auctions); Spiro Drug Service, Inc. v. Board of Com'rs of Union City, 130 N. J. L. 1, 30 A. 2d 892, aff'd., 130 N. J. L. 496, 33 A. 2d 872 (drug store); Starkey v. Atlantic City, 132 N. J. L. 27, 38 A. 2d 198 (drug store); Amodio v. Board of Com'rs of Town of West New York, 133 N. J. L. 220, 43 A. 2d 889 (barber shop); advanced by defendant-respondent in support of the challenged Ordinance, all involved the proper exercise of the police power of the municipality by means of reasonable regulation and restriction. The foregoing cases are illustrations of a valid exercise of the police power. They are not authority for the unlimited, unrestricted and prohibitory use of the police power as set forth in Section 4 of the Ordinance under review.

We conclude that Section 4 of the Ordinance under attack represents an attempt by the municipality under the guise of regulation, to prohibit and outlaw, under all circumstances and conditions, the use of sound amplifying systems. It follows that this portion of the ordinance is in collision and at variance with the principles relating to and governing a valid exercise of municipal police powers. As such, it cannot be sustained. It is then the duty and province of the Court to declare it invalid. N. J. Good Humor, Inc. v. Board of Com'rs of Borough of Bradley Beach, 124 N. J. L. 162, 11 A. 2d 113, Opinion by Mr. Justice Heher; First Church of Christ, Scientist, Newark, New Jersey v. Board of Adjustment of City of Newark, 128 N. J. L. 376, 26 A. 2d [fol. 32] 246, Opinion by Chancellor Campbell; O'Mealia Outdoor Advertising Co. v. Mayor and Council of the Borough of Rutherford, 128 N. J. L. 587, 27 A. 2d 863, Opinion by Mr. Justice Donges; Phillips v. Borough of East Paterson, 134 N. J. L. 161, 46 A. 2d 667, Opinion by Mr. Justice Bodine., Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A. L. R. 1446; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660; Dobbins v. Los Angeles, 195 U. S.

223, 49 L. ed. 169, 25 S. Ct. 18; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273.

The judgment below is reversed.

Justice Heher and Judges Wells and Freund concur in the foregoing opinion.

[File endorsement omitted.]

[fol. 33] In New Jersey Court of Errors and Appeals

No. 27. February Term, 1947

Charles Kovacs, Prosecutor-Appellant,

vs.

Albert Cooper, Jr., Judge of the First District Police Court of Trenton, Defendant-Respondent

Memorandum—Filed April 24, 1947

Colie, J.:

I am of the opinion that the judgment under review should be reversed but I do not agree that Section 4 of the ordinance is an unconstitutional exercise of the police power. The privilege of a citizen to use the streets for the communication of ideas is not absolute but must be exercised in subordination to the general comfort and convenience. Most assuredly the prohibition against making "loud and raucous" noises is a reasonable regulation.

Appellant was found guilty of a violation of Section 4 of "An Ordinance to prohibit the making of unnecessary noise." Section 4 reads:

"That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle

operated or standing upon said streets or public places aforementioned."

The prohibition is against the emitting of "loud and raucous" noises and applies equally to each of the enumerated categories, i.e. sound truck, loud speaker, sound amplifier, radio or phonograph with loud speaker or sound amplifier, calliope or any other instrument.

[fol. 34] The only evidence before the trial court was that a patrolman heard a sound truck broadcasting music and heard a man's voice broadcasting from the sound truck. There is not a scintilla of evidence that the music or voice was loud or raucous, and under the wording of Section 4 such proof is an essential prerequisite to a finding of guilt of a violation.

[fol. 34a] [File endorsement omitted.]

[fols. 35-36] In New Jersey Court of Errors and Appeals

No. 27. February Term, 1947

Charles Kovacs, Appellant,

vs.

Albert Cooper, Jr., Judge, &c., Respondent

Argued Feb. 6, 1947. Decided Apr. 24, 1947

On appeal from the Supreme Court, whose opinion is reported in 135 N. J. L. 65.

The judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division, which renders any opinion by the court impossible.

For the appellant, George Pellettieri.

For the respondent, Louis Josephson and John A. Brieger.

Per Curiam:

The judgment herein is affirmed by an equally divided court.

"Endorsed. Filed—April 24, 1947. Lloyd B. Marsh, Clerk."

[fol. 37] In New Jersey Court of Errors and Appeals

February Term, 1947

On Appeal from Supreme Court

Charles Kovacs, Prosecutor-Appellant,

vs.

Albert Cooper, Jr., Judge of the First District Police Court of Trenton, Defendant-Respondent

Judgment of Affirmance and Remittitur—Filed December 9, 1947

This cause having been duly argued at the February Term, 1947, of this Court by George Pellettieri, Esquire, of Counsel for the appellant and Louis Josephson, Esquire, of Counsel for the respondent, and the court having considered the same, and the judges being equally divided on whether the judgment should be reversed;

It is thereupon, on this 9th day of December, in the year of our Lord one thousand and nine hundred and forty-seven, ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Louis Josephson, Attorney for Defendant-Respondent.

A True Copy: Lloyd B. Marsh, Clerk.

[fol. 37a] [File endorsement omitted.]

[fol. 38] In New Jersey Court of Errors and Appeals

[Title omitted]

Petition for Appeal—Filed December 11, 1947

Considering himself aggrieved by the final judgment of the New Jersey Court of Errors and Appeals entered on the 9th day of December, 1947, in the above-entitled cause, the appellant herein, Charles Kovacs, hereby prays that an appeal be allowed to the Supreme Court of the United

States herein, and for an Order allowing same and fixing the amount of the bond thereon.

STATEMENT

This case is one in which the validity of state legislation is drawn in question, to wit, Ordinance No. 430 of the City of Trenton, New Jersey, passed August 8, 1946, and the Fourth Section of said Ordinance, reading as follows:

"An ordinance to prohibit the making of unnecessary noise.

"The board of commissioners of the city of Trenton, New Jersey, do ordain:

"1. That it is hereby declared to be a nuisance and it shall be unlawful for any person, firm or corporation to make, cause or suffer or permit to be made or caused [fol. 39] upon any premises owned, occupied or controlled by him or it, or upon any public street, alley or thoroughfare in the City of Trenton, any unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of said city, or any number thereof.

"2. That it shall be unlawful for any person, firm or corporation to play, use, operate or permit to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the production or reproduction of sound with louder volume than is necessary for convenient hearing of the person so playing, using or operating such instrument or device and such persons who are voluntary [fol. 40] listeners thereto, or in such manner as to disturb the peace, quiet and comfort of neighboring inhabitants. Nothing herein contained shall be construed to prohibit playing by a band or orchestra in a hall, building or in the open air.

"3. That it shall be unlawful for any person, firm or corporation for advertising purposes or for the purpose of attracting the attention of the passing public, to play, use, operate, or permit to be played, used or operated any radio receiving set, musical in-

strument, phonograph, loud speaker, sound amplifier, or other machine or device for the producing or reproducing of sound on the streets or public places of the City of Trenton or in any place where the sound therefrom is cast directly upon the streets or public places, or which is so placed and operated that the sound therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public place, or of persons in neighboring premises.

[fol. 41] "4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned.

"5. That it shall be unlawful for any person, firm or corporation to sound any horn or warning device on any automobile, motocycle, bus or other vehicle, except when required by law, or when necessary to give timely warning of the approach of the vehicle or as a warning of impending danger to persons driving other vehicles or to persons upon the street. No person shall sound any horn or warning device on any automobile, motorcycle, bus or other vehicle which [fol. 42] shall emit an unreasonably loud or harsh sound, or for any unnecessary or unreasonable period of time.

"6. That any person, firm or corporation who shall violate any of the provisions of this ordinance shall upon conviction thereof be punished by a fine of not to exceed two hundred ($200.00) dollars, or by imprisonment in the county jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is

violated shall be deemed and taken to be a separate and distinct offense.

"7. That all ordinances and parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed, but only to the extent of such conflict or inconsistency, and this ordinance shall be in full force and effect immediately upon its adoption and its publication, as provided by law.

"8. Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitu-[fol. 43] tional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

"I hereby certify that this is a true copy.

"Dated Trenton, N. J., September 6, 1946.

T. J. Burns, City Clerk."

Said Ordinance was in force and effect at the time of the offense alleged in the complaint. It is drawn in question upon the ground that it is repugnant to the 14th Amendment to the United States Constitution.

Therefore in accordance with the rules of the Supreme Court of the United States (Rule 46, paragraph 2) and 28 U. S. C. secs. 344 and 354, and Section 237 (a) of the Judicial Code, the petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C. sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

Assignments of Error

Now comes the appellant in the above cause and files herewith, together with his petition for appeal, these assignments of error and says that they are errors committed by the courts below in the record and proceedings of the above-entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court says that the New Jersey Court of Errors and Appeals erred in [fol. 44] affirming the judgment of the New Jersey Supreme Court affirming the judgment of conviction entered against

appellant by the First District Police Court of the City of Trenton because

1. The provisions of the Ordinance deprive appellant of his rights to freedom of speech, freedom of press, freedom to communicate information and opinions to others and freedom of assembly contrary to Section 1 of the 14th Amendment to the United States Constitution and are therefore unconstitutional.

2. The provisions of the Ordinance are beyond the police power of the City of Trenton and are prohibitory and not regulatory.

3. As it has been construed and applied by the courts below to abridge and deny appellant's constitutionally guaranteed rights of freedom of speech, of press, of assembly, and to communicate information and opinions to others, the Ordinance is presumptively unconstitutional, and which presumption the appellee has failed to overcome by a showing that the Ordinance is a reasonable and necessary means to prevent a clear, present and substantial danger to the public peace and order, or right of a state to protect the welfare of its inhabitants, and is constitutional.

4. The provisions of the Ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of the 14th Amendment to the Constitution of the United States.

5. The provisions of the Ordinance are unconstitutional in that they do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what [fol. 45] amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment, in violation of the 14th Amendment to the Federal Constitution guaranteeing due process and equal protection of law.

PRAYER FOR REVERSAL

For an on account of the above errors, the appellant, Charles Kovacs, prays that the said judgments of the First District Police Court of the City of Trenton, the Supreme Court of New Jersey and the New Jersey Court of Errors and Appeals, hereinbefore described in the above-entitled cause be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of appellant and for his costs.

George Pellettieri, 1 West State Street, Trenton 8, New Jersey, Attorney for Appellant.

[fols. 45a-47] [File endorsement omitted.]

[fols. 48-49] Citation in usual form showing service on Louis Josephson, et al., filed Dec. 11, 1947, omitted in printing.

[fol. 50] IN NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 11, 1947

Appellant, Charles Kovacs, in the above-entitled cause has prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment rendered by the New Jersey Court of Errors and Appeals on December 9, 1947, affirming the judgment of the New Jersey Supreme Court which affirmed the judgment of the First District Police Court of Trenton convicting appellant of a violation of an Ordinance of the City of Trenton.

It appearing that appellant, in his motions and arguments of counsel made in his behalf in this cause, attacked the Ordinance in question on the grounds, as contended by him, that it was void and unconstitutional and violative of the fundamental freedoms guaranteed and secured by the 14th Amendment to the Constitution of the United States, all of which contentions were overruled; and

It appearing that appellant on June 20, 1947, presented and filed his Petition for Appeal to the Supreme Court of the United States, a Statement, Assignments of Error and

Prayer for Reversal and Statement as to Jurisdiction, all within three months from the date said judgment of the New Jersey Court of Errors and Appeals became final, and it further appearing that the said New Jersey Court of Errors and Appeals is the court of last resort in New [fol. 51] Jersey in which a decision can be had in this cause, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

It Is on this 11th day of December, 1947, Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the judgment of the New Jersey Court of Errors and Appeals in the aforesaid cause as provided by law, and

It Is Further Ordered that the Clerk of the New Jersey Court of Errors and Appeals shall prepare and certify a transcript of the record, proceedings and judgment in said cause, together with all exhibits in their original form and the judgment rendered by the New Jersey Court of Errors and Appeals in connection with the proceedings in this cause, and transmit the same to the Clerk of the Supreme Court of the United States so that he shall have the same in said Court within twenty (20) days from this date, and

It Is Further Ordered that a bond on appeal for appearance and costs on appeal be fixed in the sum of Five Hundred ($500.00) Dollars and appellant having presented an undertaking conditioned as required by law in the sum of Five Hundred ($500.00) Dollars executed by good and sufficient sureties, it is further ordered that such undertaking or bond be and the same is hereby approved and ordered filed.

It Is Further Ordered that the issuance of mandate or execution be stayed pending a final disposition of this appeal and until the return of the mandate from the Supreme Court of the United States.

Done at Trenton, New Jersey, on this 11th day of December, 1947.

A. Dayton Oliphant, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals.

[fol. 51a] [File endorsement omitted.]

[fol. 52] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Recalling Remittitur—Filed December 11, 1947

A Remittitur having been entered on the 9th day of December, 1947, remanding the record in this cause to the New Jersey Supreme Court, and an appeal from the judgment of the New Jersey Court of Errors and Appeals having been taken by the appellant to the Supreme Court of the United States:

It is on this 11th day of December, 1947, Ordered that the said Remittitur dated the 9th day of December, 1947, be and hereby is recalled for the purpose of enabling the Clerk of this Court to certify the record and proceedings in this cause to the Clerk of the Supreme Court of the United States.

A. Dayton Oliphant, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals.

[fols. 52a-54] [File endorsement omitted.]

[fol. 55] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 56] In Supreme Court of the United States

Statement of Points Relied On—Filed December 30, 1947

Comes now appellant, Charles Kovacs, in the above-entitled cause and states that the points upon which he intends to rely in the Supreme Court of the United States in this cause are as follows:

1. The provisions of the Ordinance deprive appellant of his rights to freedom of speech, freedom of press, freedom to communicate information and opinions to others and freedom of assembly contrary to Section 1 of the 14th Amendment to the United States Constitution and are therefore unconstitutional.

2. The provisions of the Ordinance are beyond the police power of the City of Trenton and are prohibitory and not regulatory.

3. As it has been construed and applied by the courts below to abridge and deny appellant's constitutionally guaranteed rights of freedom of speech, of press, of assembly, and to communicate information and opinions to others, the Ordinance is presumptively unconstitutional, and which presumption the appellee has failed to overcome by a showing that the Ordinance is a reasonable and necessary means to prevent a clear, present and substantial danger to the public peace and order, or right of a state to protect the welfare of its inhabitants, and is constitutional.

[fol. 57] 4. The provisions of the Ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of the 14th Amendment to the Constitution of the United States.

5. The provisions of the Ordinance are unconstitutional in that they do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment in violation of the 14th Amendment to the Federal Constitution guaranteeing due process and equal protection of law.

For the above reasons the judgment of the New Jersey Court of Errors and Appeals should be reversed.

George Pellettieri, 1 West State Street, Trenton 8, N. J., Attorney for Appellant.

[fol. 57a] [File endorsement omitted.]

[fol. 58] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed January 8, 1948

To the Clerk of the Supreme Court of the United States:

Comes now the appellant in the above-entitled cause and states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

1. Judgment of Affirmance and Remittitur returned by the New Jersey Court of Errors and Appeals to the New Jersey Supreme Court.

2. Order Recalling Remittitur entered by the New Jersey Court of Errors and Appeals.

3. State of the Case on Appeal to the New Jersey Court of Errors and Appeals.

4. Opinion of New Jersey Supreme Court.

5. Pur Curiam Opinion of New Jersey Court of Errors and Appeals.

6. Opinion of Mr. Justice Howard Eastwood of New Jersey Court of Errors and Appeals.

7. Memorandum of Mr. Justice Frederic R. Colie of New Jersey Court of Errors and Appeals.

[fol. 59] 8. Petition for Allowance of Appeal to the Supreme Court of the United States, Statement, Assignments of Error and Prayer for Reversal.

9. Citation.

10. Order Allowing Appeal to the Supreme Court of the United States.

11. Statement of Points to be Relied Upon.

12. Order Noting Probable Jurisdiction on Appeal.

Dated at Trenton, New Jersey, January 5, 1948.

George Pellettieri, Counsel for Appellant; 1 West State Street, Trenton 8, N. J.

[fol. 60] Proof of Service by Acknowledgment

On behalf of appellee, Albert Cooper, Jr., Judge of the First District Police Court of Trenton in the above-mentioned cause, service is hereby acknowledged of a copy of the Designation of Parts of Record to be printed.

Received at Trenton, New Jersey, on this 6th day of January, nineteen hundred and forty-eight.

Louis Josephson.

John A. Brieger, Counsel and Attorney of Record for Appellee; Albert Cooper, Jr., Judge of the First District Police Court of Trenton.

[fol. 60a] [File endorsement omitted.]

[fol. 61] Supreme Court of the United States

Order Noting Probable Jurisdiction—Filed June 21, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 52,735. New Jersey, Court of Errors and Appeals, Term No. 9. Charles Kovacs, Appellant, vs. Albert Cooper, Jr., Judge of the First District Police Court of Trenton. Filed December 30, 1947. Term No. 9 O. T. 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 505

CHARLES KOVACS,

Appellant,

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

GEORGE PELLETTIERI,
Counsel for Appellant.

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NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES KOVACS,

Appellant;

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON,

Appellee

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 (1) of the Supreme Court of the United States, as amended April 6, 1942, appellant filed his statement disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. 344 (a), which provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, • • • where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, • • • of the United

States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a Writ of Error."

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

The appellant relies on the 14th Amendment to the Constitution of the United States as a basis for the jurisdiction of the United States Supreme Court.

Legislation Drawn in Question

This case is one in which the validity of State legislation is drawn in question, to wit, Ordinance No. 430 of the City of Trenton, New Jersey, passed August 8, 1946, and the Fourth Section of said Ordinance, reading as follows:

"AN ORDINANCE TO PROHIBIT THE MAKING OF UNNECESSARY NOISE

"THE BOARD OF COMMISSIONERS OF THE CITY OF TRENTON, NEW JERSEY, DO ORDAIN:

"1. That it is hereby declared to be a nuisance and it shall be unlawful for any person, firm or corporation to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him or it, or upon any public street, alley or thoroughfare in the City of Trenton, any unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of said city, or any number thereof.

"2. That it shall be unlawful for any person, firm or corporation to play, use, operate or permit to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the production or reproduction of sound with louder volume than is necessary for convenient hearing of the person so playing, using or operating such instrument or device and such persons who are voluntarily listeners thereto, or in such manner as to disturb the peace, quiet and comfort of neighboring inhabitants. Nothing herein contained shall be construed to prohibit playing by a band or orchestra in a hall, building or in the open air.

"3. That it shall be unlawful for any person, firm or corporation for advertising purposes or for the purpose of attracting the attention of the passing public, to play, use, operate, or permit to be played, used or operated any radio receiving set, musical instrument, phonograph, loud speaker, sound amplifier, or other machine or device for the producing or reproducing of sound on the streets or public places of the City of Trenton or in any place where the sound therefrom is cast directly upon the streets or public places, or which is so placed and operated that the sound therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public place, or of persons in neighboring premises.

"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned.

"5. That it shall be unlawful for any person, firm or corporation to sound any horn or warning device on any automobile, motorcycle, bus or other vehicle, except when required by law, or when necessary to give timely warning of the approach of the vehicle or as a warning of impending danger to persons driving other vehicles or to persons upon the street. No person shall sound any horn or warning device on any automobile, motorcycle, bus or other vehicle which shall emit an unreasonably loud or harsh sound, or for any unnecessary or unreasonable period of time.

"6. That any person, firm or corporation who shall violate any of the provisions of this ordinance shall upon conviction thereof be punished by a fine of not to exceed two hundred ($200.00) dollars, or by imprisonment in the county jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated shall be deemed and taken to be a separate and distinct offense.

"7. That all ordinances and parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed, but only to the extent of such conflict or inconsistency, and this ordinance shall be in full force and effect immediately upon its adoption and its publication, as provided by law.

"8. Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

"I hereby certify that this is a true copy.

"Dated Trenton, N. J., September 6, 1946.

T. J. Burns,
City Clerk."

Timeliness

The decision of the New Jersey Court of Errors and Appeals, affirming the judgments of the New Jersey Supreme Court and of the First District Police Court of Trenton assessing a fine of $50.00 was rendered on the 24th day of

April, 1947. On the 9th day of December, 1947, the judgment of affirmance on said decision, which is here sought to be reviewed, was entered, whereupon the judgment of conviction became final.

The application for the allowance of the appeal was presented to the Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals on the 20th day of June, 1947, and was duly allowed on the 11th day of December, 1947, after the judgment of affirmance, which is the final judgment of the New Jersey Court of Errors and Appeals was entered. The application and allowance were, therefore, timely and this appeal is duly presented and filed within three months from the date such judgment of the New Jersey Court of Errors and Appeals became final.

Opinion

The judgment of the New Jersey Supreme Court was affirmed by the New Jersey Court of Errors and Appeals by an equally divided court which rendered any opinion by the court impossible. The statement of the New Jersey Court of Errors and Appeals to that effect is reported in 135 N. J. L. 534, 52 Atl. 2d 806, and is an appendix to this jurisdictional statement. Reported in the same place and added as appendixes also are the opinion written by Mr. Justice Howard Eastwood of the New Jersey Court of Errors and Appeals in which Mr. Justice Harry Heher and Judges Wells and Freund concurred, and the opinion of Mr. Justice Colie. These opinions favored the reversal of the judgment of the New Jersey Supreme Court. The opinion of the New Jersey Supreme Court is reported in 135 N. J. L. 64, 50 Atl. 2d 451, is set out in the record. (S. C. pp. 15-21) and is an appendix to this jurisdictional statement.

Statement of the Case

(References hereinbefore and hereinafter made to the record refer to the printed record, the State of the Case, as filed with the Court of Errors and Appeals of New Jersey.)

This proceeding against Charles Kovacs was instituted in the First District Police Court of Trenton, New Jersey, by a complaint signed and filed by Patrolman V. Domanski, Police Officer of the City of Trenton (S. C. p. 3).

In the complaint it was charged that appellant, Charles Kovacs, on August 22, 1946, violated the Fourth Section of an Ordinance of the City of Trenton, No. 430, entitled "An Ordinance to Prevent the Making of Unnecessary Noise" in that he "did, on South Stockton Street, in said City, play, use and operate a device known as a sound truck" (S. C. p. 3).

Appellant was arrested on August 23, 1946, under such complaint. The case came on for hearing in the First District Police Court of Trenton on the same day. At the opening of the case appellant, through his counsel, demurred and moved to dismiss the complaint on the ground that the Ordinance upon which the complaint was based was unconstitutional, giving his grounds and reasons therefor, which motion was denied (S. C. pp. 4-5). Appellant testified in his defense (S. C. pp. 5-6). He was adjudged guilty, convicted and sentenced to pay a fine of $50.00 (S. C. p. 6).

On application of the appellant, the Supreme Court of New Jersey issued a Writ of Certiorari directed to Albert Cooper, Jr., Judge of the First District Police Court of Trenton to review the legality of the said judgment of conviction (S. C. p. 1). In the time and manner required by law, the said Judge filed with the Supreme Court of New Jersey his return to the Writ of Certiorari (S. C. pp. 2-9). In the Supreme Court of New Jersey, appellant contended

that the aforesaid Ordinance violated certain provisions of the State Constitution and the 14th Amendment to the Constitution of the United States (S. C. pp. 10-13). The Federal Constitutional questions presented to the New Jersey Supreme Court are the same as are presented to this Court on appeal.

In due course the case came on for hearing before the New Jersey Supreme Court. An opinion was written in which the reasons were stated for affirming the judgment of the First District Police Court of Trenton (S. C. pp. 15-21, 135 N. J. L. 64, 50 Atl. 2d 451). The Court pointed out in its opinion that the record before it showed that "the sole question presented to this court by the prosecutor is the constitutionality of the ordinance. Two grounds on which it is attacked are, first, that it deprives the prosecutor of his rights to freedom of speech and freedom to communicate information and opinions to others and freedom of assembly in violation of Article 1, Paragraph 5, and Article 1, Paragraph 18, of the New Jersey Constitution and Section 1 of the Fourteenth Amendment of the United States Constitution; second, that the provisions of the ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of Article 1, Section 1, of the Constitution of New Jersey and Section 1 of the Fourteenth Amendment of the Constitution of the United States," but held that the Ordinance was constitutional. A Judgment of Affirmance was duly entered (S. C. p. 22).

Thereafter, appellant, in the time and manner prescribed by law, filed and served his Notice of Appeal and Grounds to the New Jersey Court of Errors and Appeals presenting the same constitutional questions (S. C. p. 23). Upon appeal the judgment was affirmed because of an equally divided Court (6-6) which rendered any opinion by the Court impossible. Two opinions were written supporting appel-

lant's contentions and a reversal of the judgment of the New Jersey Supreme Court, one by Mr. Justice Howard Eastwood and the other by Mr. Justice Frederic R. Colie.

How Federal Issues Were Raised

At the trial in the First District Police Court of Trenton appellant demurred and filed a Motion to Dismiss the Complaint raising, among other things, the constitutional questions herein listed (S. C. p. 5). The same constitutional questions were raised before the Supreme Court of New Jersey (S. C. pp. 10-13) and before the New Jersey Court of Errors and Appeals (Brief of appellant in New Jersey Court of Errors and Appeals pp. 4, 5). These grounds were considered and discussed by the trial court (S. C. p. 5), by the Supreme Court of New Jersey (S. C. pp. 15-21) and later by the New Jersey Court of Errors and Appeals, but in all instances were decided adversely to appellant.

Thus there is presented a suit wherein is drawn in question the validity of a municipal ordinance of the City of Trenton adopted pursuant to authority of the State of New Jersey and constituting state action on the ground of its being repugnant to the Constitution of the United States in which the decision of the Highest Court of that State was in favor of the validity of the ordinance.

Wherefore it is submitted that the United States Supreme Court has jurisdiction to review the judgment appealed from.

Facts

Appellant is a life long resident of the City of Trenton. At the time of his apprehension and arrest on August 23, 1946, he was engaged in operating and using a sound apparatus attached to a motor vehicle on South Stockton Street, in Trenton, New Jersey, for the purpose of expressing him-

self on the subject of a labor dispute which was in progress on said South Stockton Street in said city (S. C. pp. 4-6).

Grounds and Decisions Sustaining Appellate Jurisdiction of the Supreme Court of the United States and Showing Federal Questions Involved on Appeal.

ONE

Municipal Ordinances adopted pursuant to State authority constitute State action and are within the prohibition of the 14th Amendment to the Constitution of the United States.

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757;

Home Telephone & Telegraph Company v. *Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510;

Cuyahoga River Power Company v. *Akron*, 240 U. S. 462, 36 S. Ct. 402, 60 L. Ed. 743;

Lovell v. *Griffin*, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666.

The appellee claims for the City of Trenton the legal power and State authority to adopt the aforesaid Ordinance under specific and general statutory enactments being Revised Statutes of New Jersey 1937, 40:48-1 and 40:48-2, which provide:

40:48-1:

"Ordinances; general purpose.

"The governing body of every municipality may make, amend, repeal and enforce ordinances to:

"Auctions and noises. 8. Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent *disturbing noises*."

40:48-2:

> "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."

This being so, the Ordinance in question is within the prohibition of the 14th Amendment to the Constitution of the United States.

Two

Appeal is the remedy for review of a decision of the State Court of last resort in favor of the validity of a State law and a municipal Ordinance, where the State law or municipal Ordinance is alleged to infringe the Federal Constitution.

Western Turf Association v. *Greenberg*, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 520;

Great Northern Ry. Co. v. *State of Minn.*, 278 U. S. 503;

Nashville & St. Louis Ry. v. *White*, 278 U. S. 456.

Three

The *provisions of the Ordinance* deprive appellant of his rights to freedom of speech, freedom of press, freedom to communicate information and opinions to others and freedom of assembly contrary to Section 1 of the 14th Amendment to the United States Constitution and are, therefore, unconstitutional.

Lovell v. *Griffin*, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666;

Hague v. *C.I.O.*, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423;
Schneider v. *New Jersey*, 308 U. S. 147;
Jamison v. *Texas*, 318 U. S. 413, 63 S. Ct. 669;
Ex Parte Jackson, 96 U. S. 727, 24 L. Ed. 877;
Cantwell v. *Connecticut*, 310 U. S. 296, 84 L. Ed. (Adv.) 836;
Thornhill v. *Alabama*, 310 U. S. 88;
Martin v. *City of Struthers, Ohio*, 319 U. S. 141, 63 S. Ct. R. 862;
Jones v. *Opelika*, 316 U. S. 584, 595, 596.

Discussion

Under the 14th Amendment to the United States Constitution, basic civil liberties including freedom of speech, press and assembly are guaranteed against infringement by the several states.

The power of municipalities to enact regulations in the interest of public safety, health and welfare or convenience may not be so employed as to abridge constitutional rights of freedom of speech, of communicating information and opinion to others, of the press and of assembly. Civil Liberties are not subjected to the "'comfort and convenience" of the citizens.

Public streets, parks, highways, hustings, commons, plazas and other public places have been used as forums for the dissemination of information and opinion, public discussion and the exchange of ideas upon social, political, economic, religious and other important subjects in which the people have an interest as far back as the mind of free people can remember. These forums cannot be denied to the people by censorship laws or prohibitory laws. *Jamison* v. *Texas*, 318 U. S. 413, 63 S. Ct. 669; *Schneider* v. *New Jersey*, 308 U. S. 147; *Hague* v. *C. I. O.*, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423.

The Ordinance in question, in its broad sweep prohibits speech entirely whether in a public or private place. It seeks to make no distinction as to the times, places, purposes or the contents of the utterances which it forbids. It lays down a blanket ban on all outdoor speaking, anywhere.

Section 4 of the Ordinance, under which appellant was charged, prohibits any person from using for any purpose whatsoever, a loud speaker or sound amplifier which emits therefrom "loud and raucous noises" and is attached to any vehicle operated or standing upon the streets of the City of Trenton.

This case falls squarely within the rule announced by the Supreme Court of the United States in *Hague* v. *C. I. O.*, *supra;* in so far as the Ordinance provides for prohibition of the use of necessary and ancillary equipment in the exercise of freedom of speech the case falls within the rule announced by the court in *Jamison* v. *Texas*, 318 U. S. 413.

The mere fact that the Ordinance is directed to the use of such sound apparatus on the streets or public places of the City of Trenton does not save it from the constitutional prohibition. It rather serves to condemn it. In the case of *Hague* v. *C. I. O.*, *supra*, the U. S. Supreme Court declared unconstitutional an Ordinance of the City of Jersey City which sought to license, through the Director of Safety, public meetings in streets, parks and public places. The Supreme Court in denouncing the Ordinance held (307 U. S., at p. 515):

> *"Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places have, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.*

"The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; *but it must not in the guise of regulation be abridged or denied.*"

And at page 516:

"We think the Court below was right in holding the Ordinance quoted in note one void upon its face. It does not make comfort and convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. *But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.*"

In recent years, it has come to be recognized by all that the use of amplifying devices in radio broadcasting and in public speaking in public places such as auditoriums, streets, parks and halls, is a necessary and usual ancillary for effective free speech that is intelligible. Without the use of such devices the right of free speech is definitely and seriously curtailed and impaired, if not frustrated entirely. Accordingly, it can now be said that the use of sound devices is a necessary part of the effective exercise of freedom of speech. *Therefore, the right to interfere with the use of such amplifying devices is limited to the same rules of restraint and regulation as would apply to any restraint upon the exercise of freedom of speech itself. The mere fact that this*

is an amplifying device does not alone provide the city with new and extraordinary reasons for prohibiting and censoring the use of such device.

The use of speech in the exercise of these constitutional rights is not static, is not confined to peroration of ancient times. The inhabitant of this land, in his exercise of speech, is as much entitled to use modern-day inventions to augment his exercise of that right as he is in exercising his right of freedom of the press entitled to use modern-day printing machinery. Amplifying devices are as much a part of effective exercise of modern-day speech over the radio and in public places as is paper or the printing press essential for effective exercise of freedom of press. Purely because sound-amplifying devices are relatively new and a departure from traditional practice is no reason for prohibiting their use for lawful purposes any more than would be justifiable the prohibition of use of the printing press because it was relatively modern.

Assuming that the city has the right to reasonably regulate the use of a sound amplifying device in circumstances like those here involved, as to time, place and manner, this Ordinance is not such. It appears on its face to be prohibitory. It does not attempt, either explicitly or implicitly, to license or in any other way regulate or control the use of sound apparatus on the City streets in the exercise of free speech and the communication of information and views. Section 4 of the Ordinance is so sweeping in its ban that it prevents any public outdoor meeting for any purpose whatsoever. It absolutely and unequivocally prevents the communication of views and the exercise of free speech, for it is practically impossible to exercise those rights on public streets today and be heard without the use of sound amplifiers.

The United States Supreme Court in *Hague* v. *C. I. O.*, *supra*, pointed out that no more grave and important issue

can be brought to the Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship, and that although the 14th Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgment, *it is clear that the right peaceably to assemble and to discuss topics and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the amendment protects.* The Court further pointed out (307 U. S., at p. 525):

> *"It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose."*

The section of the Ordinance in question is not limited to speech which is obscene, offensive to public morals or advocates unlawful conduct. Nor does it make comfort or convenience in the use of streets the standard of official action. It is comprehensive in its ban of the use of sound apparatus and forbids it for any and every purpose. There is no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants or the misuse or obstruction of the streets. It prohibits entirely the use of a device which is a great convenience to those who desire to hear and be heard and has a necessary relationship to the exercise of freedom of speech and assembly.

Although the rights previously enumerated are not absolute, and the State in the exercise of its police power may punish the abuse of these freedoms, it cannot under the guise of regulation abridge or infringe upon them.

These guaranteed rights are not exercised in a vacuum. They naturally and impliedly include the attraction of a crowd. The United States Supreme Court has recognized this with respect to the exercise of freedom of the press. In the case of *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877, the Court held that regulations against the transportation in the mail of printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press and stated (96 U. S., p. 733, 24 L. Ed., p. 879):

> "Liberty of circulating is as essential to that freedom as liberty of publishing, indeed, without the circulation, the publication would be of little value."

The same principle applies to the case at bar. A speech is delivered to an audience. The freedom to make a speech includes the freedom to be heard. *Section 4 of the Ordinance cannot be saved because it relates to the distribution of speech and not to the enunciation, for liberty of circulating is as essential to that freedom as liberty of speaking. Without the circulation, the enunciation would be of little value. Ex parte Jackson, supra; Lovell v. City of Griffin, supra.*

In the case of *Schneider* v. *State of New Jersey*, 308 U. S. 147, 60 S. Ct. 146, the United States Supreme Court declared unconstitutional an Ordinance of the Town of Irvington which prohibited canvassing, soliciting and the distribution of circulars, or other matter, or calling from house to house in that town, without first having reported to and received a permit from the Chief of Police or other police officer. In making its decision, the Court held the Ordinances not to be regulatory, but censorial and prohibitory and stated (308 U. S. at p. 150):

> *"This Court has characterized the freedom of speech and that of the press as fundamental personal rights*

and liberties. This phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights that lies at the foundation of free government by free men. It stresses as do many opinions of this Court, the importance of preventing the restriction or enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the Courts should be astute to examine the effect of the challenged legislation. *Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.* And so, as cases arise, the delicate and difficult task falls upon the Court to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

"In Lovell *v.* City of Griffin, supra, this Court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the City Manager. The opinion pointed out that the Ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of streets, and was without limitation as to time or place of distribution. The Court said that, whatever the motive, the Ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship; and that the Ordinance was void on its face, because it abridged the freedom of the press. • • •

"• • • As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which in-

vades the free communication of information and opinion secured by the Constitution. * * * But, as we have said * * * one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

"While it affects others, the Irvington (New Jersey) ordinance drawn in question in No. 11, as construed below, affects all those who, like petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities, it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it * * *

"As said in Lovell *vs.* City of Griffin, supra (303 U. S. 444), pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantee.

"*Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval.* * *

> "Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

In a subsequent decision, *Cantwell* v. *Connecticut*, 310 U. S. 296; 84 L. Ed. (Adv. 836) a statute which prohibited solicitation without a permit of money or subscriptions for religious causes, was held to violate the freedom of speech guaranty as applied to one who stopped two men on the street, set up a phonograph and played a record attacking a certain religion and church. The court said:

> "First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment * * * *In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.* No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon the streets, and of holding meeting thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured,

solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited. * * * But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. * * * *Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.* Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."

In *Thornhill* v. *Alabama* (310 U. S. 88) the prohibitory statute there knocked down prevented picketing and going upon private premises. The petitioner picketed upon the private premises of the Brown Wood Preserving Company, Inc., contrary to its wishes, and in defiance of its commands to leave the property. In setting aside the conviction as being an abridgment of freedom of speech and press, the court said:

"First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in

those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare United States *vs.* Carolene Products, 304 U. S. 144, 152-153n. *Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations.* Schneider *v.* State, 308 U. S. 147, 161, 162.

"Second * * * proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. * * * It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See Near *v.* Minnesota, 283 U. S. 697, 713. One who might have had a license merely for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. * * *

"* * * The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. * * *"

In the case of *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. Ed 941, 58 S. Ct. 66, the United States Supreme Court declared unconstitutional an Ordinance of the City of Griffin,

Ga., which prohibited the distribution of literature of any kind without a permit from the City manager, stating (303 U. S., at p. 451):

> "We think that the Ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of freedom of the press by subjecting it to license and censorship."

The New Jersey Supreme Court conceded that the freedoms of expression and assembly of appellant may have been prohibited, but justifies such prohibition on the ground that it leaves untouched his right to express his views orally without the aid of an amplifier (S. C., pp. 17, 18). It is well established by a long line of decisions that the restriction of any basic civil right cannot be justified by the fact that other rights remain unimpaired and that the denial of a right in one manner, respect or place may not be warranted by the freedom to exercise that right in other ways, respects or places. See *Schneider* v. *State of New Jersey*, 308 U. S. 147, where the U. S. Supreme Court declared: "*But as we have said* * * * *one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.*"

Appellant has the right to the most effective exercise of his freedoms and such exercise of those rights cannot be burdened or diminished. If the use of a sound amplifier makes the exercise of his rights to freedom of speech and assembly more effective, then neither the legislating body nor the Courts may deny him the use of such equipment. "*Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the*

effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama, supra.*

The New Jersey Supreme Court adopts a "forced audience theory to support its decision and concludes (S. C., p. 20):

> "The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen. The means of expression through a sound amplifier is tantamount to compulsion."

Certainly, there cannot be said to be more of an element of compulsion in the use of a sound amplifier in the exercise of freedom of expression and freedom of assembly, than exists when literature is distributed in the exercise of freedom of the press and speech, whether by handing it to a person, or leaving it on his doorstep, or sending it through the mails. Nor is there any greater compulsion than can be said to exist in canvassing, soliciting or making house-to-house calls for religious or political purposes. *Schneider* v. *State of New Jersey, supra; Lovell* v. *Griffin, supra; Cantwell* v. *Conn., supra; Ex parte Jackson, supra.* Those are just as much acts of compulsion in the same sense as the use of a sound amplifier.

However, the "forced audience" theory in such circumstances has been entirely vitiated by the decision of the United States Supreme Court in the above cases and definitely in the case of *Martin* v. *City of Struthers, Ohio*, 319 U. S. 141; 63 S. Ct. R. 862. There, appellant, espousing a religious cause, canvassed homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. The city ordinance forbade the summoning of inmates in that manner for that purpose. The Supreme Court held the ordinance to be a violation of the constitutional rights

to free speech and press. Mr. Justice Black, speaking for the Court, stated (319 U. S., p. 141):

> "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to occupants or to invite them to political, religious, or other kinds of public meetings. *Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community.* In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the Federal Constitution's guarantee of free speech and press, possesses this power."

* * * * * * *

(p. 143):

> "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. *This freedom embraces the right to distribute literature.* Lovell *v.* Griffin, 303 U. S. 444, 452, 58 S. Ct. 666, 82 L. Ed. 949, *and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets.* Schneider *v.* State, 308 U. S. 147, 162, 60 S. Ct. 146, 151, 84 L. Ed. 155. Yet the peace, good order, and comfort of the community may imperatively require the regulation of the time, place and manner of distribution. Cantwell *v.* Conn., 310 U. S. 296, 304, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 128 A. L. R. 1352. * * *
>
> "We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in

the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message against the interest of the community which by this ordinance offers to protect the interests of all its citizens, whether particular citizens want that protection or not. The Ordinance does not control anything but the distribution of literature and in that respect it substitutes the judgment of the community for the judgment of the individual householders. • • •

"Ordinances of the sort now before us may be aimed at the protection of the householder from annoyance, including intrusion upon the hours of rest and at the prevention of crime. • • •"

(p. 145):

"While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. • • •

"Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.

"*Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to*

> *the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.* The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."

The City of Trenton does not have the power to determine for all its inhabitants that they do not desire to listen to expressions of opinions enunciated over sound amplifiers. It must preserve for those who desire to exercise their freedoms of expression and assembly in that manner and for those who are willing listeners their rights so to do, just as it must preserve the right of a distributor of literature and of those willing to receive it. The first duty of the City is to *preserve* those constitutional privileges. Whatever inconvenience it causes the City, the City must find ways to regulate without invading constitutional rights.

The United States Supreme Court has gone far to protect the right of free speech together with the other basic civil rights from invasion in any degree even to the extent of leaving them to the caprice of a licensing officer or an electorate. *West Virginia State Board of Education* v. *Barnette*, 63 S. Ct. 1178, 319 U. S. 624, 87 L. Ed. 1628.

The only permissible limitation upon the exercise of those freedoms may be said to be, at most, reasonable regulation as to time, place and manner. Ordinances prohibiting or censoring the exercise of these activities have uniformly been held unconstitutional. "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, a fortiori, invalid." *Jones* v. *Opelika*, 316 U. S. 584, 595, 596.

The Ordinance in question cuts off entirely from the hearer the right to hear effectively a public speech in a public place. It deprives the speaker of the right to be heard intelligibly by his entire audience. It therefore abridges the right of freedom of speech and of communication and of assembly. It certainly is not regulatory as to time, place or manner in which one may use a sound amplifying device in the City. It does not purport to be a revenue-raising measure to bear any excessive police burdens resulting from the use of sound equipment.

It must be conceded that the public utterances of appellant amplified in the interest of willing listeners come clearly within the category of free speech and assembly guaranteed by the Federal Constitution.

The Bill of Rights embodied in the Federal Constitution is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual—rights which are part of our democratic traditions and which no government may invade. Where a legislative body has sought to invade a field from which, under the Bill of Rights, the government is excluded, and has violated rights guaranteed by the Constitution, the courts must refuse to recognize or sanction the legislative decree. Legislative bodies are no less responsible than the courts for the preservation of the liberties of the individual, guaranteed by the Bill of Rights.

History teaches us that there have been but few infringements of personal liberty by the State which have not been justified, as they are here, in the name of the public good or under the patriotic demand for law and order. The framers of the Constitution were not unaware that, under the system which they created, most governmental curtailments of personal liberty would have the support of a legis-

lative judgment that the public interest would be better served by its curtailment than by its constitutional protection.

We cannot conceive that in prescribing, as limitations upon the power of government, the freedom of the mind, spirit and expression secured by the explicit guarantees of those freedoms, they intended or rightly could have left any latitude for a legislative judgment that the State's authority to control its public streets is an absolute to which free speech, facilitated and made more effective with the aid of every modern device, must yield. And that such authority, in so prohibiting the use of necessary and modern devices, could be made the instrument of suppression of such freedoms.

FOUR

The provisions of the Ordinance are beyond the police power of the City of Trenton and are prohibitory and not regulatory.

Schneider v. *State of New Jersey*, 308 U. S. 147;
Thornhill v. *Alabama*, 310 U. S. 88;
Cantwell v. *Conn.*, 310 U. S. 296;
Lovell v. *Griffin*, 303 U. S. 444;
Hague v. *C. I. O.*, 307 U. S. 496;
Martin v. *City of Struthers, Ohio*, 319 U. S. 141.

Discussion

Under the police power, an Ordinance must have real and substantial relation to the public safety, health, morals or general welfare. Neither the legislature nor a municipal governing body may, under the guise of promoting the general welfare, interfere with lawful activities and pursuits. Liberty means not only freedom from imprisonment or restraint, but the right to live and work, enjoy basic

freedoms and earn a livelihood in any lawful calling or to pursue any lawful trade or avocation.

The problems involved in determining whether a particular law is within the police power of the State are well summarized in Freund's work on "The Police Power," page 133, section 143, where he states: "The Questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint or requirement in proportion to the danger? is it possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?"

The New Jersey Supreme Court contends that the use of a sound truck constitutes a potential nuisance and as such is within the police power of the city for the reasons that (S. C., p. 17):

> "The attention of motorists is diverted from the efficient operation of their vehicles while that of pedestrians is almost involuntarily attracted to the source of the noise. Thus new traffic hazards are added to the ever-increasing dangers of city thoroughfares."

The record is barren of any evidence whatsoever which establishes or from which it might be inferred that attention of motorists and pedestrians is so diverted as to create new traffic hazards or that appellant's acts on the day of his arrest had that effect. There are many things on the public highways and streets which may similarly divert the attention of motorists and pedestrians, for example, billboards, window displays, road repairs, airplanes, jet planes, etc. Even a pretty girl has been known to divert the attention of motorists. Yet no governing body or court would seri-

ously contend that pretty girls should be barred from the streets and highways. Nor that such other lawful activities could or should be banned for that reason.

The United States Supreme Court has repeatedly asserted that uncontrolled official suppression of any of the guaranteed privileges cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. *Hague* v. *C. I. O., supra; Lovell* v. *Griffin, supra,* and all other cases cited herein. The point was well made in *Schneider* v. *State of New Jersey, supra,* where the Court states (308 U. S. at p. 150):

> "*Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the constitution to those who wish to speak, write, print or circulate information or opinion.*
>
> "*Municipal authorities as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets.* • • •
>
> "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. *Any burden imposed upon the city authorities in clearing and caring for the streets as in indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.* • • • *As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.*"

In *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court stated the same principle in these words: "Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

Moreover, statutes that regulate speech or the press that have been upheld as not in conflict with our fundamental law, are those directed at abuses which menace the state itself, e. g., utterances or acts inimical to public welfare, tending to corrupt public morals, incite to crime, disturb public peace, etc., *and then only where there is a clear and present danger to a substantial interest of the State. Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Conn.*, *supra*; *Thomas* v. *Collins*, 323 U. S. 516. An example of this point is given in the *Thornhill* v. *Alabama*, *supra*, as follows:

> "*The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. * * * The danger of breach of the peace or serious invasion of the rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448.*"

The principle was more recently affirmed in *Thomas* v. *Collins, supra*, where the U. S. Supreme Court said:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

There is no such showing in the instant case of any sufficiently imminent menace to the State itself or to the public welfare from the use of sound apparatus in all cases as to warrant either the legislative body or this Court in determining that the use of such apparatus is not appropriate any place in the City of Trenton and for any purpose. Appellant's conduct was not said to involve a breach of the peace, commission of a nuisance, disturbance or impeding traffic. The utterances of appellant over the loud speaker are not asserted to have been abusive, subversive or in any other respect unlawful.

An Ordinance regulating commercial pursuits and activities is one thing, but the application of regulations to conduct such as of appellant in this case, thereby interfering with his exercise of a constitutional right, is another. There is a difference in degree, which emphasizes the importance of protecting the individual from invasion of his constitutional liberties as distinguished from regulation of purely commercial enterprises. See *Schneider* v. *State of New Jersey, supra*, where the Court made the differentiation as follows: "The Ordinance is not limited to those who canvass for private profit; nor is it merely the common type of Ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general Ordinance to prohibit trespassing. It bans unlicensed views or the advocacy of any cause from door to door * * *."

Furthermore, the Ordinance here is not regulatory, but prohibitory.

It has not been shown that outright prohibition of the use of sound amplifiers is warranted; that there exists any clear and present danger to a substantial interest of the State. Prohibition may be more convenient to the law maker and easier to fashion than a regulatory measure which adequately protects the general welfare of the community without suppressing legitimate liberties. But that does not justify a repressive enactment like the present one. *Basic freedoms have a higher dignity under the Constitution than municipal or personal convenience.*

FIVE

As it has been construed and applied by the courts below to abridge and deny appellant's constitutionally guaranteed rights of freedom of speech, of press, of assembly, and to communicate information and opinions to others, the Ordinance is presumptively unconstitutional, and which presumption the appellee has failed to overcome by a showing that the Ordinance is a reasonable and necessary means to prevent a clear, present and substantial danger to the public peace and order or right of a state to protect the welfare of its inhabitants and is constitutional.

DeJonge v. *Oregon* (1937), 299 U. S. 353;
Busey v. *District of Columbia*, 78 U. S. App. D. C. 189, 138 Fed. 2d 592, Executing Mandate at 319 U. S. 579;
Murdock v. *Pa.*, 319 U. S. 105;
U. S. v. *Carolene Products Co.*, 304 U. S. 144, 152;
West Virginia State Board of Education v. *Barnette*, 319 U. S. 624, 638-640;
Thornhill v. *Alabama*, 310 U. S. 88;
Schneider v. *N. J.*, 308 U. S. 147;
Thomas v. *Collins*, 323 U. S. 516.

Discussion

The Courts below leaned upon the doctrine of the protection of public rights and the presumption of constitutionality as a refuge from the constitutional assault here made by appellant. The New Jersey Supreme Court actually conceded that the Ordinance may deprive appellant of his freedom of expression and assembly but sought to justify it on the basis of the rights of the public to "at least a modicum of peace and quiet to which it is entitled" (S. C., pp. 17-21).

When a regulation enacted under the police power of a municipality, whether on its face, as applied, or constructively, abridges, prohibits, or infringes upon any of the freedoms guaranteed by the First Amendment to the Federal Constitution, such Ordinance or regulation is *presumptively invalid* and the burden falls on the authority asserting the power under the regulation to prove by a preponderance of the evidence that the regulation is a valid exercise of the police power directed at some *abuse* of the constitutional rights which, unless prohibited or regulated, would constitute a *clear and present danger* to the health, safety or general security of the community as a whole. *The showing of the abuse is a condition precedent to the exercise of the police power, where such exercise of power has a tendency to limit, infringe, restrict or prohibit any of the constitutional freedoms.* The police power does not even exist in such cases unless there is a clear showing of the *abuse*. This rule is well stated by Chief Justice Hughes in *DeJonge* v. *Oregon* (1937), 299 U. S. 353:

> "The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. * * * Therein lies the security of the

republic the very foundation of constitutional government."

This same rule was effectively supplied by the United States Court of Appeals for the District of Columbia in *Busey* v. *District of Columbia*, decided November 8, 1943 (78 U. S. App. D. C. 189, 138 F. 2d 592, executing mandate at 319 U. S. 579). There an occupational license tax was sought to be applied to the activity of Jehovah's Witnesses. The controversy reached the Supreme Court after the precedent case of *Murdock* v. *Pennsylvania* (319 U. S. 105) had been decided May 3, 1943. The Court remanded the case to the Court of Appeals for further consideration. Upon such reconsideration, Mr. Justice Edgerton, speaking for the Court, held:

> *"Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty'* (Palko *v.* Connecticut, 302 U. S. 319, 325). They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism) * * *.
>
> *"We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The*

burden of proof in such a case should be upon those who deny that these freedoms are invaded. * * * No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms."

The decisions of the United States Supreme Court in *United States* v. *Carolene Products Co.* (1938), 304 U. S. 144, 152; *West Virginia State Board of Education* v. *Barnette* (1943), 319 U. S. 624, 638-640; *Thornhill* v. *Alabama* (1940), 310 U. S. 88; and *Schneider* v. *New Jersey* (1939), 308 U. S. 147, all apply this same rule.

In the enclosure of civil rights and fundamental personal liberties secured by the express guarantees of the Federal and State Constitutions, there is not established a broad channel in which the government and the courts may operate according to their discretion. The people, by these specific constitutional provisions, have definitely narrowed the channel of regulation and governmental activity and walled that in by high banks of rock, as it were, on both sides of the governmental waters. This is to prevent a change of course of the stream and to keep the way straight and narrow. If the government gets out of its fixed course in these precious fields, there immediately arises a presumption of invalidity and unconstitutionality to throw back the stream of regulatory practice into the fixed channel properly made by the people through their Constitution.

In his book "The Struggle for Judicial Supremacy" (New York, Knopf, 1941), Robert H. Jackson, now Associate Justice of the Supreme Court of the United States, says (page 285):

> "The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech, free press and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is

uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the court, by intervening, restores the processes of democratic government; it does not disrupt them."

The appellee thus far has failed to show a real (as distinguished from imagined) clear and present danger and has thus not discharged the heavy burden that is placed on it where these precious civil rights are infringed.

No evidence was produced and no showing made of the need for such an ordinance. Until the appellee, has discharged its burden, by proving a clear and present danger of substantial evils to the community, its attempts to apply and enforce the ordinance cannot be sustained. In holding that a clear-and-present danger test must be applied to police-power abridgments of the liberties protected by the First Amendment, the United States Supreme Court, in the "labor organizer" case, *Thomas v. Collins* (323 U. S. 516), said:

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment. (cases) That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare United States *v.* Carolene Products Co., 304 U. S. 144, 152-153.

"*For these reasons any attempt to restrict those liberties must be justified by clear public interest,*

threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on a firmer foundation.''

Judged by these standards, it is clear that appellant's conduct, under the circumstances, did not and could not constitute any clear and present danger which would justify an application of the police power that curtails the personal liberties secured by the Federal and State Constitutions.

Six

The provisions of the Ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of the 14th Amendment to the Federal and State Constitutions.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516;
Lanzetta v. *The State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888;
U. S. v. *Brewer*, 139 U. S. 278, 11 S. Ct. 538, 35 L. Ed. 190.

Discussion

The criminal statute, vague and indefinitely expressed so that it fails to establish a standard of conduct comprehensible to men of common intelligence, to the end that they may act to keep themselves without the purview of the statute, deprives defendants in criminal cases of their liberty without due process of law.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, Chief Justice White said (p. 520):

> ''Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no *immutable* stand-

ard of guilt, *but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it*, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained. * * *

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any reason wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statements as to render elaboration on the subject wholly unnecessary."

The United States Supreme Court in the case of *Lanzetta v. The State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888, held Section 4, Chapter 155, Laws of 1934, commonly known as the Gangster Act, unconstitutional on the ground that the act was vague and uncertain, the Court stating, 83 L. Ed., page 890:

"*No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.* The applicable rule is stated in Connally v. General Constr. Co., 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126: '*That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague*

that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In dealing with the question of the vagueness of this Ordinance, let us first for a moment consider the phrase "unnecessary noise." What does the Board of Commissioners mean by "unnecessary noise?" What is "necessary noise" and what is "unnecessary noise?" Webster's New International Dictionary, 2d Edition, says that "unnecessary" is something not needed or required and that "necessary" is essential to a desirable or projected end or condition or resulting from the happening in accordance with necessity; determined by the nature of things; predestined or obedient to natural law.

Who, in the case *sub judice*, is to determine what is "necessary" and what is "unnecessary" noise? By what basis or standard is this to be determined? Additionally, the terms "physically annoying," "harsh," "prolonged," "unnatural," "unusual," "physical discomfort," "loud," "annoyance," "inconvenient," "raucous," "unreasonable," are abstract and indefinite. When do they arise? Is it left to the complainant, the Police Officer or the trier of the law and the facts to determine beyond a reasonable doubt, when noises or sounds are "necessary" or "unnecessary," "physically annoying to persons," "harsh," "prolonged," "unnatural," "or unusual in their time and place" and when they occasion "physical discomfort"?

What may be deemed necessary by one person can at the same time be unnecessary to another. What may be physically annoying, harsh, prolonged, unnatural or unusual to one person may be comfortable, natural and usual to another. What may occasion physical discomfort to one may give another comfort and pleasure. How is a person to know what sounds may be deemed necessary, comfort-

able and pleasing to others and what will occasion hostile feelings in them?

Examining Section 4 of the Ordinance, we find forbidden "loud" and "raucous" noises which emanate from a sound apparatus. What is meant by "loud" and what is meant by "raucous." Webster's New International Dictionary, 2d Edition, defines "loud" as being marked by intensity or relative intensity; not low and soft or subdued. The word "raucous" it defines as disagreeably harsh.

These terms, as previously stated, are abstractions. They depend entirely upon the subjective reactions and responses of individual persons in each given case. Thus phases of human reaction or emotion are made the standard for a penal statute. This is forbidden under our law.

It has been established that a criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it, and, if deviation from a standard is prohibited the standard must be definitely fixed. *U. S.* v. *Armstrong,* 265 Fed. 683.

In *United States* v. *Brewer,* 139 U. S. 278 on page 288, 11 Sup. Ct. 538, on page 541 (35 L. Ed. 190) the Supreme Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States *v.* Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States *v.* Lacher, 134 U. S. 624, 628."

The entire ordinance is replete with words and phrases which lack certainty. In the first section we find such

phrases as "unnecessary noises," "physically annoying to persons" or so "prolonged, unnatural, or unusual in their use, time and place" as to occasion "physical discomfort." Those phrases are uncertain and indefinite so that serious doubts arise from the generality of just such language.

The second section of the enactment also employs the expression "with louder volume than is necessary for convenient hearing." It is ambiguous. The Ordinance fails to indicate what constitutes "convenient hearing."

The third section of the Ordinance employs the terms "annoyance," "inconvenience." These too are ambiguous and indefinite, for it does not indicate what would constitute "annoyance" or "inconvenience."

The fourth section uses the term "loud and raucous noises." This as previously stated is uncertain and indefinite and dependent upon subjective reaction and response of individual persons.

And so the same can be said of the phraseology in the sixth section, an "unreasonable loud or harsh sound" and "unnecessary" or "unreasonable" period of time.

The challenged provisions condemn no act or omission. The terms which the Ordinance employs and which it purports to denounce are so vague, indefinite and uncertain that the entire Ordinance as well as Section 4 of the Ordinance must be condemned as repugnant to the due process clause of the 14th Amendment.

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The provisions of the Ordinance are unconstitutional in that they do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh,

prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment in violation of the 14th Amendment to the Federal Constitution guaranteeing due process and equal protection of law.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516;

Discussion

If the legislature, or any law-making body, leaves to administrative officers the determination of what the law should be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void. Sutherland on Stat. Const. (2d Ed.), page 148; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

The Ordinance *sub judice* clothes administrative officers with arbitrary and discriminatory power to determine what is meant by and what constitutes "necessary" and "unnecessary" sounds, "unnecessary or unreasonable periods of time," "physically annoying to persons," "harsh," "prolonged or unnatural or unusual," "annoyance or inconvenience," and specifically in Section 4 of the Ordinance, what is meant by and what constitutes "loud and raucous noises." The Ordinance fails to specify when specific acts are brought within its prohibition under those phrases. Moreover, it fails to prescribe any rules, basis or limitations to act as a guide in forming judgments by the administering officers. The criminality is dependent upon what variant courts may determine to be loud and raucous noises. It must of necessity vary with the different reaction of every individual complainant and of every court. So construed the Ordinance and Section 4 thereof must of necessity fall within the constitutional prohibitions.

Conclusion

WHEREFORE, the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of the Court, because the Court below disposed of important and substantial Federal questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the nation's highest Court and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for the exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully Submitted,

GEORGE PELLETTIERI,
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Attorney for Appellant.

APPENDIX "A"

NEW JERSEY COURT OF ERRORS AND APPEALS, FEBRUARY TERM, 1947

No. 27

CHARLES KOVACS, *Prosecutor-Appellant,*

vs.

ALBERT COOPER, JR., *Judge of the First District Police Court of Trenton, Defendant-Respondent.*

Argued February 6, 1947. Decided April 24, 1947.

On appeal from Supreme Court, whose opinion is reported in 135 N. J. L. 65.

The judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division which renders any opinion by the court impossible.

For the Appellant—George Pellettieri of Trenton.

For the Respondent—Louis Josephson and John A. Brieger, both of Trenton.

Per CURIAM:

The judgment herein is affirmed by an equally divided court.

APPENDIX "B"

NEW JERSEY COURT OF ERRORS AND APPEALS, FEBRUARY TERM, 1947

CHARLES KOVACS, *Prosecutor-Appellant*,

vs.

ALBERT COOPER, JR., *Judge of the First District Police Court of Trenton, Defendant-Respondent*

Submitted February term, 1947.

On appeal from New Jersey Supreme Court.

For Prosecutor-Appellant—George Pellettieri of Trenton.

For Defendant-Respondent—Louis Josephson and John A. Brieger, both of Trenton.

The judgment of the Supreme Court was affirmed by reason of an evenly divided vote (6—6) of the Court of Errors and Appeals.

The following opinion sets forth the writer's reasons for a reversal of the Supreme Court Judgment.

EASTWOOD, *J.*:

Prosecutor-Appellant was convicted in the Police Court of the City of Trenton for violation of the fourth Section of an ordinance of the City of Trenton, entitled "An Ordinance to Prevent the Making of Unnecessary Noise." On certiorari, the judgment of conviction was affirmed. The factual minutiae reveal that prosecutor-appellant, on August 22, 1946, placed what is commonly known as an amplifier on a sound truck driven by another on South Stockton Street in the City of Trenton, and employed the device both for playing music and speaking through the sound amplifier. Although the record is barren as to the purpose or subject made of prosecutor-appellant's discourse, it is stated in the brief filed on his behalf that his comments were made in relation to a labor dispute then in progress in Trenton. On August 23, 1946, prosecutor-appellant was tried and convicted by defendant-respondent, sitting as Judge of the

Trenton Police Court, who imposed a fine of $50.00 upon prosecutor-appellant under the provisions of Section 4 of the ordinance in question.

The question presented for judicial determination is the constitutionality of the ordinance. It is claimed by prosecutor-appellant that the challenged ordinance deprives him of various unalienable rights, among which are freedom of speech and freedom to communicate information and opinions to others, and freedom of assembly guaranteed to him by Article 1, Paragraph 5, and Article 1, Paragraph 18 of the New Jersey Constitution, and Section 1, of the Fourteenth Amendment of the United States Constitution; also that the provisions of the ordinance are obscure, vague and indefinite in that they are improper of reasonable interpretation, and, therefore, in violation of Article 1, Section 1, of the New Jersey Constitution, and Section 1 of the Fourteenth Amendment of the United States Constitution. In defense of the ordinance it is maintained that the municipality had full and ample authority to enact the challenged legislation in its lawful exercise of its inherent Police Power; and further, that the provisions of the ordinance are not obscure, vague and indefinite and that, therefore, the ordinance in question is constitutional and the conviction of prosecutor-appellant thereunder was proper.

That portion of the ordinance under attack provides as follows:

"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

That freedom of speech and the right freely to communicate one's information and opinions to others, and the right

freely to assemble, are guaranteed to the individual under the Constitutions of this State and of the United States, are principles so well established as to admit of no dispute. Likewise the authority of a municipality to employ its inherent police powers to the end that good government, order and the protection of persons and property and for the preservation of public health, safety and welfare of its inhabitants, in exercise of such powers is a principle that is not open to challenge. It is thus apparent that individual privileges under the constitutional guarantees and police powers of the municipality for the protection of the public welfare, are relative rights, not to be arbitrarily asserted nor unqualifiedly insisted upon. Both must be so construed so as to effect a nicety of balance to the end that the rights of the individual and those of the public at large may be brought into harmonious rapprochement. The right or privilege of free speech or publication is guaranteed by the Constitutions of the United States and of the several states, has its limitations. The right is not an absolute one and although limitations upon such rights may not be made except in exceptional cases, the constitutional prohibition against freedom of speech was not intended to give immunity for every use or abuse of language. Near *v.* Minnesota, 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625; Gitlow *v.* New York, 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625. The right of freedom of speech is guaranteed by the provision of our constitutions both state and federal, and it has ever been the effort of the government of the courts to uphold and maintain it under proper and reasonable restriction. State *v.* Klapprott et al., 127 N.J.L. 395, 22 A. 2d 877. The foregoing authorities are representative of a host of decisions affirming those unalienable rights constitutionally guaranteed to the individual. On the other hand, it has been held time and time again, by authorities of equal weight and importance, that municipalities may enact regulations in the interest of the public safety, health, welfare and convenience so long as these regulations do not abridge the individual liberties secured by the State and Federal Constitutions. Schneider *v.* State of New Jersey, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146. Hague *v.* Congress of In-

dustrial Organizations, 307 U. S. 496. Cantwell *v.* Connecticut, 310 U. S. 296.

The right of a municipality to enact ordinances in furtherance of its inherent police powers finds statutory expression in the provisions of R.S. 40:48-2, which provides as follows:

"Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this State or of the United States, if it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." Specifically, under the general heading of ordinances, the governing body of every municipality may make, amend, repeal and enforce ordinances to:

"Auctions and noises. 8. Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises," R.S. 40:48-1.

Addressing our attention to the language of the challenged ordinance, it is clear that its effect is to outlaw and prohibit in toto any use of any device known as a sound truck, loud speaker or sound amplifier, * * * on or upon the public streets, alleys or thoroughfares in the City of Trenton, * * *. It prohibits such use "for advertising purposes, or for any other purposes whatsoever, * * *". The decision below was grounded on the reasoning that the purpose of the legislation in question was to proscribe by the ordinance a potential nuisance. (See Kovacs *v.* Cooper, Judge, 135 N.J.L. 64, 50 A. 2d 451). That holding we conclude was erroneous. It is difficult to conceive, and we do not perceive in what manner and by what means the use of a sound truck or an amplifying device thereon, when properly regulated and confined as to the time, area and extent of its use, is, per se, a nuisance. Conceivably an unlimited and unrestricted use of such device might result in the creation of

a nuisance, but when reasonably limited and restricted might well be considered as a proper and permissible mode and means of conveying information and opinions beneficial to the public at large. It appears to us, and we so hold, that the primary aim of Section 4 of the Ordinance, under review, is to prohibit "loud and raucous noises," at all times and in all places in the City of Trenton, emanating from sound trucks, loud speakers, sound amplifiers, radios or phonographs, equipped with loud speakers or sound amplifiers, or other similar instruments. It is thus clear that Section 4 of the Ordinance is not regulatory within a proper exercise of the police power of the municipality. As stated in Hague *v.* Congress of Industrial Organizations, supra, "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be restricted in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied." Section 4 of the challenged Ordinance seeks to impose precisely the type of municipal regulation condemned in Hague *v.* Congress of Industrial Organizations. Section 4 is thus constitutionally repugnant. As such, it cannot stand.

So far as we are able to ascertain, the precise question before us has not been judicially determined in this State. The case of Atlantic City *v.* France, 75 N.J.L. 910, 70 A. 163 (upholding an ordinance prohibiting the emission of dense smoke from smoke stacks); Schwarz Bros. *v.* Board of Health of Jersey City, 84 N.J.L. 735, 87 A. 463 (relating to the removal of dead animals from public streets); Welsh *v.* Morristown, 98 N.J.L. 630, 121 A. 697 (regulating parking); Falco *v.* Atlantic City, 99 N.J.L. 19, 122 A. 610 (barber shop); Wagman *v.* Trenton, 102 N.J.L. 492, 134 A. 115 (public auctions); Spiro Drug Service, Inc., *v.* Board of Com'rs of Town of West New York, 133 N.J.L. 220, 43 A. 2d 889 (barber shop); advanced by defendant-respondent in support of the challenged Ordinance, all involved the public exercise of the police power of the municipality by means of reasonable regulation and restriction. The foregoing cases

are illustrations of a valid exercise of the police power. They are not authority for the unlimited, unrestricted and prohibitory use of the police power as set forth in Section 4 of the Ordinance under review.

We conclude that Section 4 of the Ordinance under attack represents an attempt by the municipality under the guise of regulation, to prohibit and outlaw, under all circumstances and conditions the use of sound amplifying systems. It follows that this portion of the ordinance is in collision and at variance with the principles relating to and governing a valid exercise of municipal police powers. As such, it cannot be sustained. It is then the duty and province of the Court to declare it invalid. N. J. Good Humor, Inc., *v.* Board of Com'rs of Borough of Bradley Beach, 124 N.J.L. 162, 11 A. 2d 113, Opinion by Mr. Justice Heher; First Church of Christ, Scientist, Newark, New Jersey, *v.* Board of Adjustment of City of Newark, 128 N.J.L. 376, 26 A. 2d 246, Opinion by Chancellor Campbell; O'Mealia Outdoor Advertising Co. *v.* Mayor and Council of the Borough of Rutherford, 128 N.J.L. 587, 27 A. 2d 863, Opinion by Mr. Justice Donges; Phillips *v.* Borough of East Paterson, 134 N.J.L. 161, 46 A. 2d 667, Opinion by Mr. Justice Bodine. Meyer *v.* Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Jones *v.* Portland, 245 U. S. 217, 62 L. Ed. 252, 38 S. Ct. 112, L.R.A. 1918C, 765, Ann. Cds. 1918E, 660; Dobbins *v.* Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 S. Ct. 18; Mugler *v.* Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273.

The judgment below is reversed.

Justice Heher and Judges Wells and Freund concur in the foregoing opinion.

APPENDIX "C"

NEW JERSEY COURT OF ERRORS AND APPEALS, FEBRUARY TERM, 1947

No. 27

CHARLES KOVACS, *Prosecutor-Appellant,*

vs.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton, *Defendant-Respondent*

MEMORANDUM OF COLIE, J.

I am of the opinion that the judgment under review should be reversed but I do not agree that Section 4 of the Ordinance is an unconstitutional exercise of the police power. The privilege of a citizen to use the streets for the communication of ideas is not absolute but must be exercised in subordination to the general comfort and convenience. Most assuredly the prohibition against making "loud and raucous" noises is a reasonable regulation.

Appellant was found guilty of a violation of Section 4 of "An Ordinance to Prohibit the Making of Unnecessary Noise." Section 4 reads:

> "That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

The prohibition is against the emitting of "loud and raucous" noises and applies equally to each of the enumer-

ated categories, i. e. sound truck, loud speaker, sound amplifier, radio or phonograph with the loud speaker or sound amplifier, calliope or any other instrument.

The only evidence before the trial court was that a patrolman heard a sound truck broadcasting music and heard a man's voice broadcasting from the sound truck. There is not a scintilla of evidence that the music or voice was loud and raucous, and under the wording of Section 4 such proof is an essential prerequisite to a finding of guilt of a violation.

APPENDIX "D"

NEW JERSEY SUPREME COURT, OCT. TERM, 1946

No. 258

CHARLES KOVACS, *Prosecutor,*

v.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton, *Respondent*

Submitted October 1, 1946; Decided on Certiorari

For the prosecutor, George Pellettieri.
For the respondent, Louis Josephson and John A. Brieger.

Before Justices Bodine, Perskie and Wachenfeld

The opinion of the court was delivered by

WACHENFELD, *J.:*

This writ of certiorari brings up for review prosecutor's conviction by the Police Court of the City of Trenton upon a complaint charging him with violating the fourth section of an ordinance of the City of Trenton entitled "An Ordinance to Prevent the Making of Unnecessary Noise."

The facts are undisputed that on August 22, 1946 prosecutor set an amplifier on a truck and while driven by another on South Stockton Street in the City of Trenton, first played music and then spoke through the sound amplifier. There

is no testimony in the record to indicate the purpose or the subject of this speech, although prosecutor's brief states he was using the sound apparatus to comment on a labor dispute then in progress in Trenton. He was tried and convicted in the Trenton Police Court on the following day upon a complaint charging a violation of Section 4 of the aforesaid ordinance and fined $50. in accordance with Section 6 thereof.

Section 4 of the ordinance reads as follows:

"That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

Section 6 of the said ordinance, dealing with the penalty provisions, reads as follows:

"That any person, firm or corporation who shall violate any of the provisions of this ordinance shall, upon conviction thereof, be punished by a fine of not to exceed two hundred ($200) dollars, or by imprisonment in the County Jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated, shall be deemed and taken to be a separate and distinct offense."

The sole question presented to this court by the prosecutor is the constitutionality of the ordinance. Two grounds on which it is attacked are, first, that it deprives the prosecutor of his rights to freedom of speech and freedom to communicate information and opinions to others and freedom of assembly in violation of Article 1, Paragraph 5, and Article 1, Paragraph 18, of the New Jersey

Constitution and Section 1 of the Fourteenth Amendment of the United States Constitution; second, that the provisions of the ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of Article 1, Section 1, of the Constitution of New Jersey and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The relevant provisions of the ordinance apply only to (1) vehicles (2) containing an instrument in the nature of a sound amplifier or any other instrument emitting loud and raucous noises and (3) such vehicle operated or standing upon the public streets, alleys or thoroughfares of the city. The problem raised is novel in this jurisdiction. The court in *Evening Times Printing and Publishing Company v. American Newspaper Guild, et al.*, 124 N. J. Eq. 71, raised but passed over the question of the legality per se of the use of sound trucks with broadcasting amplifiers. In that case, it should be noted, there was no municipal ordinance involved and the complainant only sought to enjoin misrepresentations and not all broadcasting through the amplifier.

The purpose of the legislation is clear. The conduct proscribed by this ordinance constitutes a potential nuisance. The attention of motorists is diverted from the efficient operation of their vehicles while that of pedestrians is almost involuntarily attracted to the source of the noise. Thus new traffic hazards are added to the ever-increasing dangers of city thoroughfares. Hence, the purpose of the ordinance is founded in reason.

The freedoms of expression and assembly of the prosecutor may have been prohibited in this respect, but the ordinance leaves untouched the right of the prosecutor to express his views orally without the aid of an amplifier.

While the freedoms of speech and assembly are enunciated and preserved by the New Jersey and United States Constitutions, these freedoms are not absolute but may be curtailed under a reasonable exercise of the police power where the public health, safety and general welfare of the municipality demand.

In *Cox v. New Hampshire*, 312 U. S. 569, 61 Sup. Ct. 762, the United States Supreme Court considered the constitu-

tionality of a state statute prohibiting a "parade or procession" upon a public street without a special license. In upholding the validity of the statute the court pointed out the position of civil liberties in organized society and said:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

In Hague *v.* Congress of Industrial Organizations, 307 U. S. 496, 59 Sup. Ct. 954, while declaring unconstitutional an ordinance of the City of Jersey City which sought to license through the director of public safety meetings in the streets, parks and public places, the Supreme Court pointed out the same principal of ordered liberty in the following words:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the

public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

"The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied."

The freedoms of speech and assembly to which the prosecutor is entitled are not restricted except to benefit the general welfare and in such a manner that the "opportunities for the communication of thought and the discussion of public questions" are not substantially curtailed. Such regulation cannot be deemed a violation of the constitutional guaranties to which the prosecutor is generally entitled.

The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen. The means of expression through a sound amplifier is tantamount to compulsion. The booming voice of a speaker in crowded thoroughfares of the city forcibly attracts the attention of almost all within a wide area. That alleged right was never intended to be guaranteed by either Constitution.

While there are no decisions in this jurisdiction concerning anti-noise ordinances, there are others which indicate a municipality may exercise its police power for the benefit of the public health, safety and general welfare even though such exercise might result in the regulation of constitutional liberties and deprivation of certain rights. In *Atlantic City* v. *France*, 75 N. J. L. 910, this court held valid an ordinance prohibiting the emission from smoke stacks of dense smoke containing soot in sufficient quantities to fall upon the surface of the city. Similarly, in *Schwarz Bros. Co.* v. *Board of Health*, 84 N. J. L. 735, an ordinance relating to the removal of dead animals from the public streets of Jersey City was held constitutional. An ordinance regulat-

ing parking was upheld in *Welsh* v. *Morristown*, 98 N. J. L. 630. This State has unhesitatingly permitted the regulation of various types of business enterprises where required by the public welfare. *Falco* v. *Atlantic City*, 99 N. J. L. 19 (barber shop); *Wagman* v. *Trenton*, 102 N. J. L. 492 (public auctions); *Spiro Drug Service* v. *Union City*, 130 N. J. L. 1, aff'd 130 N. J. L. 496 (drug store); *Starkey* v. *Atlantic City*, 132 N. J. L. 27 (drug store); *Amodio* v. *West New York*, 133 N. J. L. 220 (barber shop).

Other jurisdictions have approved anti-noise ordinances. *Brachey* v. *Maupin*, 277 Ky. 467, 126 S. W. (2d) 881; *Maupin* v. *Louisville, et al.*, 284 Ky. 195, 144 S. W. (2d) 237; *Hamilton* v. *Montrose*, 109 Colo. 228; 124 P. (2d) 757.

There is no merit to the contention that the ordinance is so obscure, vague and indefinite as to violate Section 1, Article 1, of the New Jersey Constitution and the Fourteenth Amendment of the Federal Constitution.

Only Section 4 of the ordinance, upon which the prosecutor was convicted, is relevant. In simple, unambiguous language it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint. The phraseology of the statute should leave no doubt in the mind of anyone of common intelligence as to what is forbidden.

Its provisions are not unreasonable or oppressive but, on the contrary, are logical and advisable and its enforcement will give to the public at least a modicum of peace and quiet to which it is entitled.

Judgment affirmed with costs.

Mr. Justice Perskie dissents.

Filed December 30, 1946.

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SUPREME COURT, U.S.

Supreme Court of the United States

October Term 1947
No. 505

CHARLES KOVACS,
Appellant,

against

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON,
Appellee,

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

MOTION TO NOTE JURISDICTION AND TO ADVANCE CONSIDERATION

GEORGE PELLETTIERI
Counsel for Appellant

Supreme Court of the United States

October Term 1947

No. 505

CHARLES KOVACS,

Appellant,

against

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON,

Appellee.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

MOTION TO NOTE JURISDICTION AND TO ADVANCE CONSIDERATION

MAY IT PLEASE THE COURT:

Now comes George Pellettieri, counsel for appellant, and moves the Court to note jurisdiction in this case and to set it down for argument before the decision is reached in *Saia* v. *New York,* No. 504, October Term, 1947.

Although Section 4 of the Trenton Ordinance drawn in question here, is identical with Section 2 of the Lockport ordinance in *Saia* v. *New York,* there are important differences that require this case to be considered before the case of *Saia* v. *New York* is decided.

The use of the device in this case was in connection with a labor dispute between employer and employee in the City of Trenton, resulting in the National Labor Relations Act augmenting the support given the appellant in this case by the Constitution. *Republic Aviation Corporation* v. *National Labor Relations Board*, and *National Labor Relations Board* v. *Le Tourneau Company of Georgia*, 324 U. S. 793. See also *Thornhill* v. *Alabama*, 310 U. S. 88.

This case is different from the *Saia* case also for the reason that appellant in the courts below and here challenges the validity of the ordinance on the ground that it is vague and indefinite. The use of the terms "unnecessary noise", "physically annoying", "unnatural", "unusual", "annoyance" and "unreasonable", permit the ordinance to be used as a dragnet and provide no ascertainable standard of guilt for the guidance of a court or jury in determining whether the ordinance has been violated, and results in a deprivation of the appellant's rights and liberties, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

The ordinance here is condemned in principle by a long line of decisions recently applied in *Winters* v. *New York*, where the Court said:

> "* * * It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258 * * *

"On its face, the subsection here involved violates the rule of the *Stromberg* and *Herndon* cases, *supra*, that statutes which include prohibitions of acts fairly within the protection of a free press are void * * *

"* * * Again in *State* v. *Klapprott*, 127 N. J. L. 395, a statute was held invaild on an attack against its constitutionality under state and federal constitutional provisions that protect an individual's freedom of expression. The statute reads as follows, p. 396:

> 'Any person who shall, in the presence of two or more persons, in any language, make or utter any speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state by reason of race, color, religion or manner of worship, shall be guilty of a misdemeanor.'

The court said, pp. 401-2:

'It is our view that the statute, *supra*, by punitive sanction, tends to restrict what one may say lest by one's utterances there be incited or advocated hatred, hostility or violence against a group "by reason of race, color, religion or manner of worship." But additionally and looking now to strict statutory construction, is the statute definite, clear and precise so as to be free from the constitutional infirmity of the vague and indefinite? That the terms "hatred," "abuse," "hostility," are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The criminal code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit.'"

(*Winters* v. *New York*, No. 3, October Term, 1947; decided March 29, 1948. See slip opinion, pp. 2-3, 5, 10. 16 Law Week 4279, 4280, 4282). See also the discussion and cases cited under Ground Six of the Jurisdictional Statement filed in this case. This case is not governed by *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

In view of these differences and the relation between this case and the case of *Saia* v. *New York*, No. 504, October Term, 1947, these cases were docketed together with the view that jurisdiction would be granted in both and that both cases would be considered and heard consecutively.

The noting of jurisdiction in the *Saia* case and failing to note jurisdiction in this case will result in injury to the appellant if precedent is established by a decision adverse to Saia in his case. This case will be affected thereby and appellant will not have had his day in court by giving his counsel an opportunity to orally discuss the differences and the issues here mentioned.

WHEREFORE appellant prays that the Court forthwith note jurisdiction in this case and set it down for oral argument at an early date and, if possible, before the decision in *Saia* v. *New York*, No. 504, October Term, 1947, is reached. Appellant prays for such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

GEORGE PELLETTIERI
1 West State Street
Trenton 8, New Jersey
Counsel for Appellant

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Supreme Court of the United States

October Term, 1948.

No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANT.

GEORGE PELLETTIERI,
Counsel for Appellant.

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Supreme Court of the United States.

OCTOBER TERM 1948.

No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANT.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. 344 (a).

Under the Act of Congress of January 31, 1928, Chapter 440, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on Writ of Error. This case presents a state of facts within the jurisdiction of this Court.

OPINIONS OF COURTS BELOW.

The judgment of the New Jersey Supreme Court was affirmed by the New Jersey Court of Errors and Appeals by an equally divided Court which rendered any opinion by the Court impossible. The statement of the New Jersey Court of Errors and Appeals to that effect is reported in 135 N. J. L. 584, 52 Atl. 2d 806 and is set out in the record. [24] [1] Reported in the same place are the opinion written by Mr. Justice Howard Eastwood of the New Jersey Court of Errors and Appeals in which Mr. Justice Harry Heher and Judge Wells and Freund concurred, and the opinion of Mr. Justice Colie. These opinions favored the reversal of the judgment of the New Jersey Supreme Court. They are set out in the record. [18-24] The opinion of the New Jersey Supreme Court is reported in 135 N. J. L. 64, 50 Atl. 2d 451 and is set out in the record. [10-15] The First District Police Court of the City of Trenton did not write an opinion.

STATEMENT OF CASE.

Questions Presented.

1. Do the provisions of the Ordinance, which forbid the use of sound devices upon the streets or thoroughfares of the City of Trenton, prohibit and abridge appellant's exercise of freedoms of speech, press, assembly, and the freedom to communicate information and opinions to others contrary to Section 1 of the 14th Amendment to the United States Constitution?

2. Is it within the police power of the City of Trenton to prohibit completely the use by speakers on its public streets and thoroughfares of sound amplifying devices that are not inherently dangerous to the safety, health, morals,

1. All figures appearing in brackets herein denote pages of the printed record.

peace, general welfare or property of the city's inhabitants?

3. Is the Ordinance, on its face and as construed and applied, unconstitutional because it abridges appellant's freedoms of speech, assembly, press and to communicate information and opinions to others contrary to the 14th Amendment to the United States Constitution?

4. Are the provisions of the Ordinance so obscure, vague and indefinite as to make them impossible of reasonable interpretation contrary to the 14th Amendment to the Constitution of the United States?

5. Are the provisions of the Ordinance, which fail to fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises and what is unnecessary and unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment, in violation of the 14th Amendment to the United States Constitution?

Legislation Drawn in Question.

This case draws into question the validity of State legislation, to wit, Ordinance No. 430 of the City of Trenton, New Jersey, passed August 8, 1946, and the 4th Section of said Ordinance, reading as follows:

> "1. That it is hereby declared to be a nuisance and it shall be unlawful for any person, firm or corporation to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him or it, or upon any public street, alley or thoroughfare in the City of Trenton, any unneces-

sary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of said city, or any number thereof.

"2. That it shall be unlawful for any person, firm or corporation to play, use, operate or permit to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the production or reproduction of sound with louder volume than is necessary for convenient hearing of the person so playing, using or operating such instrument or device and such persons who are voluntarily listeners thereto, or in such manner as to disturb the peace, quiet and comfort of neighboring inhabitants. Nothing herein contained shall be construed to prohibit playing by a band or orchestra in a hall, building or in the open air.

"3. That it shall be unlawful for any person, firm or corporation for advertising purposes or for the purpose of attracting the attention of the passing public, to play, use, operate, or permit to be played, used or operated any radio receiving set, musical instrument, phonograph, loud speaker, sound amplifier, or other machine or device for the producing or reproducing of sound on the streets or public places of the City of Trenton or in any place where the sound therefrom is cast directly upon the streets or public places, or which is so placed and operated that the sound therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public place, or of persons in neighboring premises.

"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee,

to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned.

"5. That it shall be unlawful for any person, firm or corporation to sound any horn or warning device on any automobile, motorcycle, bus or other vehicle, except when required by law, or when necessary to give timely warning of the approach of the vehicle or as a warning of impending danger to persons driving other vehicles or to persons upon the street. No person shall sound any horn or warning device on any automobile, motorcycle, bus or other vehicle which shall emit an unreasonably loud or harsh sound, or for any unnecessary or unreasonable period of time.

"6. That any person, firm or corporation who shall violate any of the provisions of this ordinance shall upon conviction thereof be punished by a fine of not to exceed two hundred ($200.00) dollars, or by imprisonment in the county jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated shall be deemed and taken to be a separate and distinct offense.

"7. That all ordinances and parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed, but only to the extent of such conflict or inconsistency, and this ordinance shall be in full force

and effect immediately upon its adoption and its publication, as provided by law.

"8. Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby." [5-7, 26-28]

Timeliness.

The decision of the New Jersey Court of Errors and Appeals was rendered on the 24th day of April, 1947. [24] On the 9th day of December, 1947, the Judgment of Affirmance on said decision, which is here sought to be reviewed, was entered whereupon the judgment of conviction became final. [25] The Petition for Appeal to this Court was duly and timely presented. [25-30] The application for the allowance of the appeal was presented on June 20, 1947. [30] On December 11, 1947, after the Judgment of Affirmance, which is the final judgment of the New Jersey Court of Errors and Appeals, was entered, an order was made and entered allowing appeal to this Court. [30-31] On June 21, 1948, this Court noted probable jurisdiction. [35]

Form and History of Action.

This proceeding was instituted in the First District Police Court of Trenton, New Jersey, by a complaint. The complaint charged that appellant, Charles Kovacs, on August 22, 1946, violated the 4th Section of the above-named Ordinance of the City of Trenton, No. 430, entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" in that he "did, on South Stockton Street, in said City, play, use, and operate a device known as a sound truck." [3]

Appellant was arrested on August 23, 1946, under such complaint. The case came on for hearing in the First District Police Court of Trenton on the same day. [4] At the opening of the case appellant, through its counsel, de-

murred and moved to dismiss the complaint on the ground that the Ordinance upon which it was based was unconstitutional, giving his grounds and reasons therefor, which motion was denied. [4] Appellant thereupon entered a plea of not guilty and was brought to trial. [4] Evidence was presented on behalf of the State and by appellant. [4] He was adjudged guilty, convicted and sentenced to pay a fine of $50.00. [5]

On application of the appellant, the Supreme Court of New Jersey on September 9, 1946, issued a Writ of Certiorari directed to Albert Cooper, Jr., Judge of the First District Police Court of Trenton, to review the legality of said judgment of conviction. [1] Reasons for setting aside the conviction and sentence were duly served and filed. [7-9] After argument, submission and deliberation the New Jersey Supreme Court affirmed on January 13, 1947. [15-16]

On January 14, 1947, appellant duly served and filed his Notice of Appeal and Grounds to the New Jersey Court of Errors and Appeals. [16] After argument, submission and deliberation the New Jersey Court of Errors and Appeals, on April 24, 1947, filed a statement that the Judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division. [24] On June 20, 1947, appellant duly presented his Petition for Appeal, Statement, Assignments of Error and Prayer for Reversal to the court below. [30-31] On December 9, 1947, a Judgment of Affirmance of the New Jersey Court of Errors and Appeals was duly entered whereupon the said judgment of the New Jersey Court of Errors and Appeals became final. [25] The Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals allowed appeal to this Court on December 11, 1947. [30-31] This Court noted probable jurisdiction on June 21, 1948. [35]

Facts.

Appellant is a life long resident of the City of Trenton. At the time of his apprehension and arrest on August 23, 1946, he was engaged in operating and using a sound apparatus attached to a motor vehicle on South Stockton Street, in Trenton, New Jersey, for the purpose of expressing himself on the subject of a labor dispute which was in progress on said South Stockton Street in said city. [3-5]

How Issues Raised.

In the First District Police Court of Trenton, the appellant demurred and filed a Motion to Dismiss the Complaint raising, among other things, the constitutional questions herein listed. [4] The Judge of the Police Court specifically passed upon the constitutional questions raised by the appellant. The motion was denied. [4]

In his Reasons for Reversal filed on the certiorari to the New Jersey Supreme Court, the appellant attacked the provisions of the Ordinance on the grounds that they deprived him of his rights of freedom of speech, of press, of assembly and to communicate information and opinions to others. He further attacked the Ordinance as being violative of the 14th Amendment of the Constitution of the United States because it is so obscure, vague and indefinite as to make it impossible of reasonable interpretation and because it does not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment. [7-9] These were overruled by the New Jersey Supreme Court. [10-15] The

New Jersey Supreme Court affirmed the judgment of conviction by the Police Court of the City of Trenton. [15-16]

The same constitutional questions were raised before the New Jersey Court of Errors and Appeals. (Brief of appellant in New Jersey Court of Errors and Appeals pages 4, 5.)

The New Jersey Court of Errors and Appeals affirmed the judgment. [25].

The New Jersey Court of Errors and Appeals certified that the constitutional questions were duly raised and considered and overruled. [30]

The Petition to this Court, duly filed in the New Jersey Court of Errors and Appeals, attacked the constitutionality of the Ordinance involved for each and every one of the Reasons advanced in the Courts below and as hereinbefore set out. [25-30]

In his Statement of Points Relied Upon, appearing in the record in this case, the appellant alleged that the Ordinance is unconstitutional because it abridges his rights of freedom of speech, freedom of press, freedom of assembly and freedom to communicate information and opinions to others, because its provisions are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and because the provisions of the Ordinance do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment all contrary to the 14th Amendment to the Constitution. [32-33]

SUMMARY OF ARGUMENT.

The Provisions of the Ordinance Deprive Appellant of His Rights to Freedom of Speech, Freedom of Press, Freedom to Communicate Information and Opinions to Others and Freedom of Assembly Contrary to Section 1 of the 14th Amendment to the United States Constitution.

A.

Public streets and thoroughfares are natural and proper places for assembly and communication of ideas through speech. In fact this is the only way of reaching millions of persons who are not accessible by house-to-house visitation.

B.

The right to speak carries the right to be heard. The right to be heard implies the rights to use auxiliary devices to reach the hearers in the exercise of speech at assemblies and in public places.

C.

Sound amplifying devices are a necessary adjunct to modern-day effective public speaking at assemblies.

D.

Freedom to be heard is as vital to freedom of speech as is freedom to circulate to freedom of press.

E.

Restricting the abridgment to the use of sound devices may not be justified on the ground that the right of free speech without such auxiliary remains unimpaired.

F.

The specious argument leading to a factitious conclusion that the use of sound devices resulted in forced audience abuse of free speech should be rejected.

G.

The provisions of the Ordinance do not regulate as to time, place and manner the use of sound devices ancillary to free speech and are, therefore, not within the police power of the City of Trenton and are prohibitory and are not regulatory.

H.

There is no showing that the use of sound device in this case was an abuse of the right of free speech so as to present a clear and present danger to interests that the City of Trenton had the right to protect.

I.

The Ordinance is presumptively unconstitutional because the State has failed to discharge the burden of proof imposed upon it in civil cases in prosecutions where the First Amendment is involved.

J.

The police power of the State authorizing the prohibition and censorship of commercial pursuits and activities does not enter here.

K.

The Ordinance is void because, on its face and as construed and applied, it prohibits the exercise of freedoms of speech, press, assembly and to communicate information and opinions to others.

L.

The Ordinance is void because its provisions are so obscure, vague and indefinite as to make them impossible of reasonable interpretation.

M.

The Ordinance is void because its provisions do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, bases or limitations to act as a guide in forming a judgment.

N.

The decisions sustaining anti-noise ordinance, as applied to sound devices used in connection with public speech at assemblies and upon public streets, are not sound.

ARGUMENT.

The Provisions of the Ordinance Deprive Appellant of His Rights to Freedom of Speech, Freedom of Press, Freedom to Communicate Information and Opinions to Others and Freedom of Assembly contrary to Section 1 of the 14th Amendment to the United States Constitution.

A.

Public streets and thoroughfares are natural and proper places for assembly and communication of ideas through speech. In fact this is the only way of reaching millions of persons who are not accessible by house-to-house visitation.

Public streets, parks, highways, hustings, commons, plazas and other public places have been used as forums for the dissemination of information and opinion, public discussion and the exchange of ideas upon social, political, economic, religious and other important subjects in which the people have an interest as far back as the mind of free people can remember. These forums cannot be denied to the people by censorship laws or prohibitory laws. *Jamison v. Texas*, 318 U. S. 413, 63 S. Ct. 669; *Schneider v. New Jersey*, 308 U. S. 147; *Hague v. C. I. O.*, 307 U. S. 496.

There is a very practical reason why persons use such public places for these purposes. Today millions of people do not remain at home during such hours as are ordinarily devoted to house-to-house calls. The only possible way to reach those millions of people, under favorable weather conditions, is by going publicly upon the streets and into the parks and other public places.

B.

The right to speak carries the right to be heard. The right to be heard implies the right to use auxiliary devices to reach the hearers in the exercise of speech at assemblies and in public places.

If one has the right to use of the streets, to assemble in public meeting, to speak to those assembled, and to communicate information and opinion, then certainly one has the right to speak in such a manner as to be heard whether it be on the city streets or anywhere else. Just as the right of free press includes the right to "distribute," so freedom of speech includes the right to be "heard." Any statute or Ordinance which seeks to prevent the use of a sound apparatus, in effect, prohibits one from being heard, and, for all practical purposes, enforces a ban on the rights of assemblage and freedom of speech and freedom to communicate information and opinion to others.

C.

Sound amplifying devices are a necessary adjunct to modern-day effective public speaking at assemblies.

This case falls squarely within the rule announced in *Saia v. New York*, 334 U. S. 558, where the Court declared:

> "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached."

Therefore, the right to interfere with the use of such amplifying devices is limited to the same rules of restraint and regulation as would apply to any restraint upon the exercise of freedom of speech itself. The mere fact that this is an amplifying device does not alone provide the city with new and extraordinary reasons for prohibiting and censoring the use of such device.

D.

Freedom to be heard is as vital to freedom of speech as is freedom to circulate to freedom of press.

In the case of *Ex parte Jackson*, 96 U. S. 727, the Court said: "Liberty of circulating is as essential to that freedom (freedom of the press) as liberty of publishing, indeed, without the circulation, the publication would be of little value."

The same principle applies to the case at bar. A speech is delivered to an audience. The freedom to make a speech includes the freedom to attract a crowd and to be heard. Section 4 of the Ordinance cannot be saved because it relates to the distribution of speech and not to the enunciation, for liberty of circulating is as essential to that freedom as liberty of speaking. Without the circulation, the enunciation would be of little value. *Ex parte Jackson, supra; Lovell v. City of Griffin*, 303 U. S. 444; *Saia v. New York, supra.*

E.

Restricting the abridgment to the use of sound devices may not be justified on the ground that the right of free speech without such auxiliary remains unimpaired.

The Supreme Court of New Jersey conceded that the freedoms of expression and assembly of appellant may have been prohibited, but justifies such prohibition on the ground that it leaves untouched his right to express his views orally without the aid of an amplifier. It is well established by a long line of decisions that the restriction of any basic civil right cannot be justified by the fact that other rights remain unimpaired and that the denial of a right in one manner, respect or place may not be warranted by the freedom to exercise that right in other ways, respects or places. See *Schneider v. State of New Jersey*, 308 U. S. 147, where the Court declared: "But as we have said, * * * one is not to have the exercise of his liberty of expression in appro-

priate places abridged on the plea that it may be exercised in some other place."

F.

The specious argument leading to a factitious conclusion that the use of sound devices resulted in forced audience abuse of free speech should be rejected.

The Court below adopted a "forced audience" theory to support its decision. The Court here should not adopt such a theory to support the decision below.

Certainly, there cannot be said to be more of an element of compulsion in the use of a sound amplifier in the exercise of freedom of expression and freedom of assembly, than exists when literature is distributed in the exercise of freedom of the press and speech, whether by handing it to a person, leaving it on his doorstep, or sending it through the mails. Nor is there any greater compulsion than can be said to exist in canvassing, soliciting or making house-to-house calls for religious or political purposes. *Schneider v. State of New Jersey, supra; Lovell v. Griffin, supra; Cantwell v. Conn., supra; Ex parte Jackson, supra.* Those are just as much acts of compulsion in the same sense as the use of a sound amplifier.

However, the "forced audience" theory in such circumstances has been entirely vitiated by the decisions of the Court in the above cases and definitely in the use of *Martin v. City of Struthers, Ohio*, 319 U. S. 141. There, appellant, espousing a religious cause, canvassed homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. The city ordinance forbade the summoning of inmates in that manner for that purpose. The Court held the ordinance to be a violation of the constitutional rights to free speech and press. Mr. Justice Black, speaking for the Court, stated (319 U. S., p. 141):

> "For centuries it has been a common practice in this and other countries for persons not specifically in-

vited to go from home to home and knock on doors or ring doorbells to communicate ideas to occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power . . . [¶] . . . This freedom embraces the right to distribute literature, *Lovell v. Griffin*, 303 U. S. 444, 452, and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. *Schneider v. State*, 308 U. S. 147, 162. . . . [¶] . . . Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." 319 U. S. at pp. 141-142, 143, 146-147.

The City of Trenton does not have the power to determine for all its inhabitants that they do not desire to listen to expressions of opinions enunciated over sound amplifiers. It must preserve for those who desire to exercise their freedoms of expression and assembly in that manner and for those who are willing listeners their rights so to do, just as it must preserve the right of a distributor of literature and of those willing to receive it. The first duty of the City is to preserve those constitutional privileges. Whatever inconvenience it causes the City, the City must find ways to regulate without invading constitutional rights.

Our Courts have gone far to protect the right of free speech together with the other basic civil rights from invasion in any degree even to the extent of leaving them to the caprice of a licensing officer or an electorate. In the case of *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, the Court pointed out that one's right to life, liberty and property, to free speech, free press, freedom of worship and assembly and other fundamental rights may not even be submitted to a vote and they depend on the outcome of no election. The Court carefully considered the Law of the State of West Virginia compelling the flag salute by school children and further pointed out that those freedoms are susceptible of restriction only to present grave and immediate danger in which the State may lawfully act and that it is the purpose of the 14th Amendment to the Federal Constitution to reserve those rights from all official control.

The Court, in *Saia v. New York*, *supra*, pointed that:

> ". . . . We must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case and freedom of speech and assembly in the Hague case. . . . [¶] Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."

G.

The provisions of the Ordinance do not regulate as to time, place and manner the use of sound devices ancillary to free speech and are, therefore, not within the police power of the City of Trenton and are prohibitory and are not regulatory.

The only permissible limitation upon the exercise of the freedoms of speech, press, assembly and of communicating information and opinions to others, may be said to be, at most, reasonable regulation as to time, place and manner. The power of municipalities to enact regulations in the interests of public safety, health or welfare or convenience may not be so employed as to abridge those constitutional rights. Civil liberties are not subjected to the "comfort and convenience" of the citizens. *Cantwell v. Connecticut, supra; Schneider v. Town of Irvington, supra.*

Ordinances prohibiting or censoring the exercise of these activities have uniformly been held unconstitutional. "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, a fortiori, invalid." *Jones v. Opelika,* 316 U. S. 584, 595, 596.

The Ordinance in question cuts off entirely from the hearer the right to hear effectively a public speech in a public place. It deprives the speaker of the right to be heard intelligibly by his entire audience. It therefore abridges the right of freedom of speech and of communication and of assembly. It certainly is not regulatory as to time, place or manner in which one may use a sound amplifying device in the City. It does not purport to be a revenue-raising measure to bear any excessive police burdens resulting from the use of sound equipment.

It must be conceded that the public utterances of appellant amplified in the interest of willing listeners come clearly within the category of free speech and assembly guaranteed by the Federal and State Constitutions.

The Ordinance is not regulatory. It appears on its face to be prohibitory.

The section of the Ordinance in question is not limited to speech which is obscene, offensive to public morals or advocates unlawful conduct. Nor does it make comfort or convenience in the use of streets the standard of official action. It is comprehensive in its ban of the use of sound apparatus and forbids it for any and every purpose. There is no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants or the misuse or obstruction of the streets. It prohibits entirely the use of a device which is a great convenience to those who desire to hear and be heard and has a necessary relationship to the exercise of freedom of speech and assembly.

Although the rights previously enumerated are not absolute, and the State in the exercise of its police power may punish the abuse of these freedoms, it cannot under the guise of regulation abridge or infringe upon them.

The permissible limitation or regulation rather than prohibition or censorship is stated by the Court as follows (*Saia v. New York, supra*):

> "Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.
>
> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discre-

tion, it sanctions a device for suppression of free communication of ideas."

Although this case falls squarely within the principles laid down by the Court in *Saia v. New York, supra,* the Ordinance in question goes much further than the Ordinance of the City of Lockport which the Court declared invalid. While the City of Lockport attempted to make a pretense at regulation by means of the issuance of a permit, the Ordinance in the instant case does not even go through the motions of regulation but lays down an absolute ban on the use of sound amplifying devices everywhere in the City of Trenton and at all times.

H.

There is no showing that the use of sound device in this case was an abuse of the right of free speech so as to present a clear and present danger to interests that the City of Trenton had the right to protect.

The Supreme Court of New Jersey contended that the use of a sound truck constitutes a potential nuisance and as such is within the police power of the City for the reasons that [12]:

> "The attention of motorists is diverted from the efficient operation of their vehicles while that of pedestrians is involuntarily attracted to the source of the noise. Thus new traffic hazards are added to ever increasing dangers of city thoroughfares."

The record is barren of any evidence whatsoever which establishes or from which it might be inferred that attention of motorists and pedestrians is so diverted as to create new traffic hazards or that appellant's acts on the day of his arrest had that effect. There are many things on the public highways and streets which may similarly divert the attention of motorists and pedestrians, for example, billboards, window displays, road repairs, airplanes,

jet planes, etc. Even a pretty girl has been known to divert the attention of motorists. Yet no governing body or court would seriously contend that pretty girls should be barred from the streets and highways. Nor that such other lawful activities could or should be banned for that reason.

The Court has repeatedly asserted that uncontrolled official suppression of any of the guaranteed privileges cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. *Hague v. C. I. O., supra; Lovell v. Griffin, supra; Schneider v. State of New Jersey; supra.*

In *Cantwell v. Connecticut*, 310 U. S. 206, the Court stated the principle in these words:

> "Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

Moreover, statutes that regulate speech or the press that have been upheld as not in conflict with our fundamental law, are those directed at abuses which menace the state itself, e. g., utterances or acts inimical to public welfare, tending to corrupt public morals, incite to crime, disturb the public peace, etc., and then only where there is a clear and present danger to a substantial interest of the State. *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Conn., supra; Thomas v. Collins*, 323 U. S. 516.

There is no such showing in the instant case of any sufficiently imminent menace to the State itself or to the public welfare from the use of sound apparatus in all cases as to warrant either the legislative body or this Court in determining that the use of such apparatus is not appropriate any place in the City of Trenton and for any purpose. Appellant's conduct was not said to involve a breach of the peace, commission of a nuisance, disturbance or impeding traffic. The utterances of appellant over the loud

speaker are not asserted to have been abusive, subversive or in any other respect unlawful.

I.

The Ordinance is presumptively unconstitutional because the State has failed to discharge the burden of proof imposed upon it in civil cases in prosecutions where the First Amendment is involved.

Both appellee and the New Jersey Supreme Court lean upon the doctrine of the protection of public rights and the presumption of constitutionality as a refuge from the constitutional assault here made by appellant. The Supreme Court actually concedes that the Ordinance may deprive appellant of his freedoms of expression and assembly, but seeks to justify it on the basis of the rights of the public to "at least a modicum of peace and quiet to which it is entitled." [12-15]

It is submitted that when a regulation enacted under the police power of a municipality, whether on its face, as applied, or constructively, abridges, prohibits, or infringes upon any of the freedoms guaranteed by the First Amendment to the Federal Constitution, such Ordinance or regulation is presumptively invalid and the burden falls on the authority asserting the power under the regulation to prove by a preponderance of the evidence that the regulation is a valid exercise of the police power directed at some abuse of the constitutional rights which, unless prohibited or regulated, would constitute a clear and present danger to the health, safety or general security of the community as a whole. The showing of the abuse is a condition precedent to the exercise of the police power where such exercise of power has a tendency to limit, infringe, restrict or prohibit any of the constitutional freedoms. The police power does not even exist in such cases unless there is a clear showing of the abuse. This rule is well stated by Chief Justice Hughes in *De Jonge v. Oregon* (1937), 299 U. S. 353:

"The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. * * * Therein lies the security of the republic the very foundation of constitutional government."

The same rule was effectively supplied by the United States Court of Appeals for the District of Columbia in *Busey v. District of Columbia*, 78 App. D. C. 189, 138 F. 2d 592. Mr. Justice Edgerton, speaking for the court said:

"Freedom of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko v. Connecticut*, 302 U. S. 319, 325) They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism.): . . . [¶] We think we may hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded . . . [¶] . . . No presumption which lacks a probable basis in fact should be per-

mitted to conceal an interference with essential freedoms."

The City of Trenton thus-far has failed to show a real (as distinguished from imagined) clear and present danger and has thus not discharged the heavy burden that is placed on it where these precious civil rights are infringed.

No evidence was produced here and no showing made of the need for such an Ordinance. Until the City of Trenton, has discharged this burden, by proving a clear and present danger of substantial evils to the community, its attempts to apply and enforce the Ordinance cannot be sustained. In holding that a clear-and-present-danger test must be applied to police-power abridgments of the liberties protected by the First Amendment, the Court, in the "labor organizer" case, *Thomas v. Collins* (323 U. S. 516), said:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment. (cases) That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153.
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack

on due process grounds, will not suffice. These rights rest on a firmer foundation."

Judged by these standards, it is clear that appellant's conduct, under the circumstances, did not and could not constitute any clear and present danger which would justify an application of the police power that curtails the personal liberties secured by the Federal Constitution.

J.

Police power of the State authorizing the prohibition and censorship of commercial pursuits and activities do not enter here.

An Ordinance regulating commercial pursuits and activities is one thing, but the application of regulations to conduct such as of appellant in this case, thereby interfering with his exercise of a constitutional right, is another. There is a difference in degree, which emphasizes the importance of protecting the individual from invasion of his constitutional liberties as distinguished from regulation of purely commercial enterprises. See *Schneider v. State of New Jersey, supra,* where the Court made the differentiation as follows:

> "The Ordinance is not limited to those who canvass for private profit; nor is it merely the common type of Ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general Ordinance to prohibit trespassing. It bans unlicensed views or the advocacy of any cause from door to door * * *." See also *Valentine v. Chrestensen,* 316 U. S. 52, 55; *Jamison v. Texas,* 318 U. S. 413, 417.

K.

The Ordinance is void because, on its face and as construed and applied, it prohibits the exercise of freedoms of speech, press, assembly and to communicate information and opinions to others.

The Ordinance in question, in its broad sweep, prohibits speech entirely whether in a public or private place. It seeks to make no distinction as to the times, places, purposes or the contents of the utterances which it forbids. It lays down a blanket ban on all outdoor speaking, anywhere.

Section 4 of the Ordinance, under which appellant was charged, prohibits any person from using for any purpose whatsoever, a loud speaker or sound amplifier which emits therefrom "loud and raucous noises" and is attached to any vehicle operated or standing upon the streets of the City of Trenton.

The Ordinance here prohibits entirely the exercise of appellant's right of free speech. It can be seen from the decision of the Court in *Saia v. New York, supra*, that the Ordinance is absolutely prohibitory.

In that case the Ordinance of the City of Lockport prevented the use of sound amplifying devices except with the permission of the Chief of Police. In rejecting the Ordinance as unconstitutional the Court said:

> "We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance there-

fore has all the vices of the ones which we struck down in *Cantwell v. Connecticut*, 310 U. S. 296; *Lovell v. Griffin*, 303 U. S. 444; and *Hague v. C. I. O.*, 307 U. S. 496.

"In the Cantwell case a license had to be obtained in order to distribute religious literature. What was religious was left to the discretion of a public official. We held that judicial review to rectify abuses in the licensing system did not save the ordinance from condemnation on the grounds of previous restraint. *Lovell v. Griffin, supra,* held void on its face an ordinance requiring a license for the distribution of literature. That ordinance, like the present one, was dressed in the garb of the control of a 'nuisance.' But the Court made short shrift of the argument, saying that approval of the licensing system would institute censorship 'in its baldest form.' In *Hague v. C. I. O., supra,* we struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent 'riots, disturbances or disorderly assemblage.' We held that the ordinance was void on its face because it could be made 'the instrument of arbitrary suppression of free expression of views on national affairs.' 307 U. S. p. 516.

"The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case,

and freedom of speech and assembly in the Hague case."

Assuming that the city has the right to reasonably regulate the use of a sound amplifying device in circumstances like those here involved, as to time, place and manner, this Ordinance is not such. It appears on its face to be prohibitory. It does not attempt, either explicitly or implicitly, to license or in any other way regulate or control the use of sound apparatus on the City streets in the exercise of free speech and the communication of information and views. Section 4 of the Ordinance is so sweeping in its ban that it prevents any public outdoor meeting for any purpose whatsoever. It absolutely and unequivocally prevents the communication of views and the exercise of free speech, for it is practically impossible to exercise those rights on public streets today and be heard without the use of sound amplifiers.

This case falls squarely within the rule announced by the Court in *Hague v. C. I. O., supra;* in so far as the Ordinance provides for prohibition of the use of necessary and ancillary equipment in the exercise of freedom of speech the case falls within the rule announced by the court in *Jamison v. Texas*, 318 U. S. 413, and in *Saia v. New York, supra.*

The mere fact that the Ordinance is directed to the use of such sound apparatus on the streets or public places of the City of Trenton does not save it from the constitutional prohibition. It rather serves to condemn it. In the case of *Hague v. C. I. O., supra*, the Court declared unconstitutional an Ordinance of the City of Jersey City which sought to license, through the Director of Safety, public meetings in streets, parks and public places. The Court, in denouncing the Ordinance, held:

> "Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used

for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places have, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

"The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied."

In *Schneider v. State of New Jersey*, 308 U. S. 147, 60 S. Ct. 146, the Court declared unconstitutional an Ordinance of the Town of Irvington which prohibited canvassing, soliciting and the distribution of circulars, or other matter, or calling from house to house in that town, without first having reported to and received a permit from the Chief of Police or other police officer. It was argued there that the ordinance and regulations involved were designed for the purpose of preserving the peace, prohibiting fraud and trespass, and to keep the streets clean and of good appearance. In making its decision, the Court held the Ordinances not to be regulatory, but censorial and prohibitory and stated:

"This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. This phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights that lies at the foundation of free government by free men. It stresses as do many opinions of this Court, the importance of preventing the restriction or enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the Courts should

be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the Court to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights . . .

"As said in *Lovell v. City of Griffin, supra* (303 U. S. 444), pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantee.

"Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval. • • •

"'Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not

empower a municipality to abridge freedom of speech and press."

In a subsequent decision, *Cantwell v. Connecticut*, 310 U. S. 296; 84 L. Ed. (Adv. 836), a statute which prohibited solicitation without a permit of money or subscriptions for religious causes, was held to violate the freedom of speech guaranty as applied to one who stopped two men on the street, set up a phonograph and played a record attacking a certain religion and church. It was contended that the law was enacted to regulate solicitations for the prevention of fraud and imposition. The Court said:

> "First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom . . . . [¶] . . . Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

In *Thornhill v. Alabama* (310 U. S. 88), the prohibitory statute there knocked down prevented picketing and going upon private premises. The petitioner picketed upon the private premises of the Brown Wood Preserving Company, Inc., contrary to its wishes, and in defiance of its commands to leave the property. In setting aside the conviction as being an abridgment of freedom of speech and press, the Court said:

> "First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured

to all persons by the Fourteenth Amendment against abridgment by a state . . .

"Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider v. State*, 308 U. S. 147, 161, 162."

L.

The Ordinance is void because its provisions are so obscure, vague and indefinite as to make them impossible of reasonable interpretation, and, therefore, are in violation of the 14th Amendment to the Federal Constitution.

The criminal statute vague and indefinitely expressed so that it fails to establish a standard of conduct comprehensible to men of common intelligence, to the end that they may act to keep themselves without the purview of the statute, deprives defendants in criminal cases of their liberty without due process of law.

In *United States v. Cohen Grocery Co.*, 255 U. S. 81, Chief Justice White said:

"Therefore because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained. . . .

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question: that is, whether the words, 'That it is hereby made unlawful for any reason wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statements as to render elaboration on the subject wholly unnecessary."

The Court in the case of *Lanzetta v. The State of New Jersey*, 306 U. S. 451, held Section 4, Chapter 155, Laws of 1934, commonly known as the Gangster Act, unconstitutional on the ground that the act was vague and uncertain, the Court stating:

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rules is stated in *Connally v. General Constr. Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In dealing with the question of the vagueness of this Ordinance, let us first for a moment consider the phrase "unnecessary noise." What does the Board of Commis-

sioners mean by "unnecessary noise?" What is "necessary noise" and what is "unnecessary noise?" Webster's New International Dictionary, 2d Edition, says that "unnecessary" is something not needed or required and that "necessary" is essential to a desirable or projected end or condition or resulting from the happening in accordance with necessity; determined by the nature of things; predestined or obedient to natural law.

Who, in the case sub judice, is to determine what is "necessary" and what is "unnecessary" noise? By what basis or standard is this to be determined? Additionally, the terms "physically annoying," "harsh," "prolonged," "unnatural," "unusual," "physical discomfort," "loud," "annoyance," "inconvenient," "raucous," "unreasonable," are abstract and indefinite. When do they arise? Is it left to the complainant, the Police Officer or the trier of the law and the facts to determine beyond a reasonable doubt, when noises or sounds are "necessary" or "unnecessary," "physically annoying to persons," "harsh," "prolonged," "unnatural," or "unusual in their time and place" and when they occasion "physical discomfort?"

What may be deemed necessary by one person can at the same time be unnecessary to another. What may be physically annoying, harsh, prolonged, unnatural or unusual to one person may be comfortable, natural and usual to another. What may occasion physical discomfort to one may give another comfort and pleasure. How is a person to know what sounds may be deemed necessary, comfortable and pleasing to others and what will occasion hostile feelings in them?

Examining Section 4 of the Ordinance, we find forbidden "loud" and "raucous" noises which emanate from a sound apparatus. What is meant by "loud" and what is meant by "raucous?" Webster's New International Dictionary, 2d Edition, defines "loud" as being marked by intensity or relative intensity; not low and soft or subdued. The word "raucous" it defines as disagreeably harsh.

These terms, as previously stated, are abstractions. They depend entirely upon the subjective reactions and responses of individual persons in each given case. Thus phases of human reaction or emotion are made the standard for a penal statute. This is forbidden under our law.

It has been established that a criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a judge or jury may think his act is in violation of it, and, if deviation from a standard is prohibited the standard must be definitely fixed.

In *United States v. Brewer*, 139 U. S. 278, the Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States v. Sharp*, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States v. Lacher*, 134 U. S. 624, 628."

The entire Ordinance is replete with words and phrases which lack certainty. In the first section we find such phrases as "unnecessary noises," "physically annoying to persons" or so "prolonged, unnatural, or unusual in their use, time and place" as to occasion "physical discomfort." Those phrases are uncertain and indefinite so that serious doubts arise from the generality of just such language.

The second section of the enactment also employs the expression "with louder volume than is necessary for convenient hearing." It is ambiguous. The Ordinance fails to indicate what constitutes "convenient hearing."

The third section of the Ordinance employs the terms "annoyance," "inconvenience." These too are ambiguous

and indefinite, for it does not indicate what would constitute "annoyance" or "inconvenience."

The fourth section uses the term "loud and raucous noises." This as previously stated is uncertain and indefinite and dependent upon subjective reaction and response of individual persons.

And so the same can be said of the phraseology in the sixth section, an "unreasonable loud or harsh sound" and "unnecessary" or "unreasonable" period of time.

The challenged provisions condemn no act or omission. The terms which the Ordinance employs and which it purports to denounce are so vague, indefinite and uncertain that the entire Ordinance as well as Section 4 of the Ordinance must be condemned as repugnant to the due process clause of the 14th Amendment and the like provisions in the State Constitution.

M.

The Ordinance is void because its provisions do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, bases or limitations to act as a guide in forming a judgment, contrary to the 14th Amendment to the Federal Constitution guaranteeing due process of law.

If the legislature, or any law-making body, leaves to administrative officers the determination of what the law should be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void. *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

The Ordinance sub judice clothes administrative officers with arbitrary and discriminatory power to determine

what is meant by and what constitutes "necessary" and "unnecessary" sounds, "unnecessary or unreasonable periods of time," "physically annoying to persons," "harsh," "prolonged or unnatural or unusual," "annoyance or inconvenience," and specifically in Section 4 of the Ordinance, what is meant by and what constitutes "loud and raucous noises." The Ordinance fails to specify when specific acts are brought within its prohibition under those phrases. Moreover, it fails to prescribe any rules, bases or limitations to act as a guide in forming judgments by the administering officers. The criminality is dependent upon what variant courts may determine to be loud and raucous noises. It must of necessity vary with the different reaction of every individual complainant and of every court. So construed the Ordinance and Section 4 thereof must of necessity fall within the constitutional prohibitions.

N.

The decisions sustaining anti-noise ordinance, as applied to sound devices used in connection with public speech at assemblies and upon public streets, are not sound.

The New Jersey Supreme Court relied upon the cases of *Cox v. New Hampshire*, 312 U. S. 569, 61 S. Ct. 762 (S. C., p. 18); *Brachey v. Maupin*, 277 Ky. 467, 126 S. W. (2d) 881; *Maupin v. Louisville, et al.*, 284 Ky. 195, 144 S. W. (2d) 237; and *Hamilton v. Montrose*, 109 Colo. 228, 124 P. (2d) 757 (S. C., p. 21). Not any one of the cases is really analogous in fact or law to the case at bar.

In both Kentucky cases cited, *Brachey v. Maupin, supra*, and *Maupin v. Louisville, supra*, the ordinances involved did not entirely prohibit the use of sound trucks, but rather attempted to regulate their use. In the former case, the attempted regulation was through designating certain areas comprising 5% of the city through which sound trucks could not be operated, letting free the remaining 95% and fixing certain hours for such operation. In the latter

case, the regulation was through a license of sound trucks by the Chief of Police. We do not pass judgment on whether such regulations were reasonable and proper, but merely point to the fact that those ordinances were not entirely prohibitory as is the one here questioned.

As a matter of fact, the Court of Appeals of Kentucky, in *Brachey v. Malpin, supra*, pointed out that the Kentucky Courts had previously stricken out two ordinances, one passed in 1931 and the other in 1935, which were entirely prohibitory and not regulatory and stated (126 S. W. (2d) at p. 882):

> "We are unable to agree that the former ordinances and the one presently involved are of the same character and kind. It is our view that they are radically different. The former two ordinances sought to entirely prohibit the operation of a sound truck in the City of Louisville at any time or place, whereas the amendatory ordinance here involved is not so broad in its scope and seeks to regulate rather than prohibit."

The Supreme Court of Colorado in *Hamilton v. City of Montrose, supra*, rested its decision mainly on the facts produced by testimony of witnesses, which were found to show that the conduct of the defendant amounted to a breach of the peace and disturbed lawful occupants and property owners in the neighborhood. The Colorado Court specifically stated (124 P. (2d) at p. 761):

> "Applying, therefore, the same standards that were used in the Cantwell Case (*Cantwell v. Connecticut, supra*), we reach an opposite conclusion in the instant case from that announced in the Cantwell case because of the differing facts."

There was no evidence of that type produced in the case sub judice, no similar factual situation and no finding of facts upon which either the lower court or the Supreme Court could base its decision.

The decision of the Court below and that of the Colorado Supreme Court in *Hamilton v. City of Montrose, supra,* are ably analyzed in the clear and cogent dissent of Mr. Justice Otto Bock in the *Hamilton* case. The dissenting opinion differed with both the findings of fact and the conclusions of law and declared (109 Colo. at p. 239):

> "The constitutional questions raised are of more importance. Within the last decade the Supreme Court of the United States, under the able leadership of the then Chief Justice Charles Evans Hughes, showed in an affirmative way how the civil liberties of the individual may be vindicated and preserved. Practically all of the cases cited in the majority opinion indicate this definite trend. What freedom of speech, the press, and exercise of religion actually mean can be determined only when these principles are tested in specific instances. The tendency now is not to widen the conflict between liberty and authority, but to reconcile the competitive relationship between these governmental principles. Would a statute or ordinance which absolutely prohibits the use of any loud-speaking device under any circumstances be an abridgment of free speech? I say it certainly would. Just as the right of free press includes the right to 'distribute', so freedom of speech includes the right to be 'heard.' The use of a loud-speaker, under the circumstances, is not a nuisance per se. . . . . A loud-speaking device is a great convenience to those who desire to hear and be heard, and bears a necessary relationship to freedom of speech. Its use may reasonably be regulated as to time, place and manner. Cantwell v. Conn., 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352. . . . Concepts of civil liberty, such as freedom of speech and the press, are relative and not absolute, and vary with time and circumstances; and so, amplification devices, in recent years, have gone largely into

use, and have their necessary place in the exercise of these constitutional rights. That a city may regulate the use of such sounding devices and protect itself 'from concentrated and continuous cacophony' already has been indicated above. The inertia which sometimes exists in municipalities in protecting individual liberty must be overcome by affirmative action in the enactment of laws that will not abridge, but reconcile, the exercise of free speech and religion, with the authority to reasonably regulate it in the interest of the public safety, health, welfare or convenience. . . .

"The majority of the court here relies on the case of *Cox v. New Hampshire*, 312 U. S. 569, 61 S. Ct. 762, 764, 85 L. Ed. 1049, 133 A. L. R. 1396, to justify its opinion. In that case the sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. In referring to that case in *Trojello v. Walenburg*, 108 Colo. 427, 118 P. 2d 1081, we said that it contained an excellent statement of the power of a municipality to impose regulations in the use of public streets." *Hamilton v. Montrose*, 109 Colo. 228, 239-240, 242.

As was shown by Mr. Justice Bock, *Cox v. New Hampshire*, 312 U. S. 569, is not in point and does not support the conclusions reached by either the Colorado or our own Supreme Court.

The ordinances involved in the *Hamilton* case and in this case have been erroneously compared with and simulated to the New Hampshire statute involved in the *Cox* case. It should be remembered that the New Hampshire Supreme Court found that the statute in the *Cox* case, as construed by the court, was a regulatory measure as to time and place. It was a revenue-raising measure to provide for policing of parades and placing a portion of the burden of expense of managing the city's traffic during a parade upon

the holders of the parade. The statute in the *Cox* case did not attempt to prohibit or censor. The ordinance in this case prohibits.

The section of the Ordinance in question is not limited to speech which is obscene, offensive to public morals or advocates unlawful conduct. Nor does it make comfort or convenience in the use of streets the standard of official action. It is comprehensive in its ban of the use of sound apparatus and forbids it for any and every purpose. There is no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants or the misuse or obstruction of the streets. It prohibits entirely the use of a device which is a great convenience to those who desire to hear and be heard and has a necessary relationship to the exercise of freedom of speech and assembly.

Although the rights previously enumerated are not absolute, and the State in the exercise of its police power may punish the abuse of these freedoms, it cannot under the guise of regulation abridge or infringe upon them.

CONCLUSION.

The principles here involved are identical to the ones determined by the Court in *Saia v. New York*, 334 U. S. 558. The present Ordinance has the same defects as the Ordinance of the City of Lockport. The terms of the Ordinance providing for prohibition of the use of sound devices are in effect identical to the prohibitory provisions of the Ordinance invalidated by this Court in *Saia v. New York, supra*, and in other former cases. As was pointed out by the Court in the *Saia* case, *supra*, the use of a sound device ancillary to the exercise of free speech is not per se an abuse of free speech but rather is an "indispensable instrument of effective public speech" and cannot be indis-

criminately and arbitrarily suppressed. The police power can control the abuse by narrowly drawn statutes.

The Court in the *Saia* case, *supra*, pointed out further that freedom of speech with the use of loud-speakers must be given the same preferred treatment that was given to freedom of religion, freedom of press and freedom of assembly in prior cases and that in balancing the various community interests the freedom of the First Amendment must be maintained in a preferred position.

The present Ordinance on its face, and as construed and applied by the Courts below, does not purport to be a regulatory law. It is prohibitory. No attempt is made by the Ordinance or the authorities enforcing it to regulate the volume of sound, or the hours or places of use of sound amplifying devices. The face of the Ordinance and the record as to its application and enforcement shows unquestionably that it is a prohibitory Ordinance. It lays down an absolute ban on the use of an adjunct of free speech which is necessary in order to make it effective. The constitution prohibits such an abridgment. Its restraints make no attempt at regulation.

Since the Court has already determined that the denial of the use of a sound device is an abridgment and curtailment of freedom of speech, the ban imposed here on the use of sound amplifiers falls within the constitutional prohibition.

There being an abridgment of the right of free speech on the public streets of the City of Trenton by the arrest, prosecution and conviction of the appellant because of his use of a sound device, it is necessary to set the conviction aside.

The criminal code must be definite and informative so there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit. The terms used in the present Ordinance are abstractions and are relative in the individual. There is no norm to judge whether or when

the forbidden reactions to the use of a sound amplifying device comes into being. It may be entirely subjective in a given case. Such phases of human reaction or emotion cannot be made a legitimate standard for a penal statute.

The criminality of an act cannot depend on whether a judge or a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. It must prescribe rules, bases or limitations to act as a guide in forming judgments by administering officers.

There being no such definiteness and certainty in the provisions of the present Ordinance and no proper standard for the determination of what constitutes a violation of such provisions, the Ordinance constitutes an abridgment of the guarantees set forth in the 14th Amendment of the United States Constitution and the arrest, prosecution and conviction of appellant under this Ordinance must be set aside.

WHEREFORE, it is respectfully submitted that the judgment of the Courts below should be reversed, the conviction set aside and the prosecution ordered dismissed.

GEORGE PELLETTIERI,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 505

CHARLES KOVACS,

Appellant,

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION

LOUIS JOSEPHSON,
Counsel for Appellee.

NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES KOVACS,

Appellant,

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON,

Appellee

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF GROUNDS AGAINST JURISDICTION OF THE SUPREME COURT

Appellee, Albert Cooper, Jr., Judge of the First District Police Court of Trenton, in the above-entitled cause, setting forth the matter or grounds against the jurisdiction of this court asserted by the appellant, alleges and says that:

1. The only provision and section of the ordinance of the City of Trenton which the appellant was convicted of violating is that known and described as Section 4, which prohibits the use of what is commonly known as a sound truck upon the public streets of the City of Trenton. Appellee submitting that appellant's right to freedom of speech, freedom of press, freedom to communicate information and opinions to others and freedom of assembly, as set forth in the first amendment to the United States Constitution, has in no way been denied or violated, as the said constitu-

tional right aforestated does not include the right to use a machine for the magnifying and throwing of the human voice for great distances upon the public streets of the city; that being the only *justiciable* issue in this cause.

2. The provisions of Section 4 of the ordinance aforestated, while being prohibitory, is within the police power of the City of Trenton, since a city may, in the interest of public order and peace, prohibit the use of sound trucks upon public streets.

3. Such ordinance has not been construed and applied by the courts below to abridge and deny appellant's constitutionally guaranteed rights of freedom of speech, of press, of assembly, and to communicate information and opinions to others, as stated, by the appellant in paragraph 3 of "Statements of Points Relied On." The construction of said ordinance by the courts below having been to the contrary. Ordinance in question is presumptively constitutional and appellee is not called upon to establish that said ordinance is necessary to prevent a clear, present and substantial danger to the peace and order, or to the right of a state to protect the welfare of its inhabitants; said ordinance being constitutional for the reasons aforestated without regard to any legal doctrines or constructions relating to the "clear and present danger rule," or any other interpretations or qualifications.

4. Section four of the ordinance aforestated prohibits the use and operation of a sound truck for any purpose whatsoever upon any public street in the City of Trenton, the same being definite, certain and clear, and is, therefore, not obscure, vague and indefinite as alleged in paragraph 4 of "Statement of Points Relied On." Said provision of the ordinance is in no way violative of the 14th Amendment of the Constitution of the United States, the provisions of said amendment in no way having any bearing or rela-

tionship to the provisions of said section of the ordinance aforestated.

5. The allegations alleged and contained in paragraph 5 of the "Statements of Points Relied On," have no application whatsoever to the provisions of Section 4 of said ordinance, and relate only to other sections of the ordinance not in issue in this cause.

For the above-stated reasons it is submitted that this Honorable Court should not entertain the jurisdiction of said cause asserted by the appellant.

Respectfully submitted,

LOUIS JOSEPHSON,
Municipal Building,
Trenton, N. J.,
Attorney for Appellee.

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Supreme Court of the United States

October Term, 1948.

No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton,

Appellee.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

Brief for Appellee

LOUIS JOSEPHSON,
Counsel for Appellee.

VanBuskirk Press, Inc., Trenton, N. J.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 9.

CHARLES KOVACS,

Appellant,

vs.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton,

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

For the purpose of correcting what appears to be an inaccurate statement relating to the specific section or provision of the *Legislation Drawn in Question* on page 3, of the appellant's brief. Respondent desires to call attention to the fact that the only portion of the ordinance of the City of Trenton involved in this appeal is Section 4, which reads as follows:

> "4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfare in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a caliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

The basis of the charge and the conviction against the appellant is that he violated the above mentioned section of the ordinance, in that he used upon the public streets of the City of Trenton, a sound truck which emitted therefrom loud and raucous noises. No other section of the ordinance is involved in any manner whatsoever in this appeal.

ARGUMENT.

Point I.

The ordinance does not deprive appellant or any other person of any constitutional right.

(a) The ordinance is not a complete prohibition.

Appellant's brief is replete with suggestions that the ordinance under attack "is comprehensive in its ban," "prohibits entirely," and "lays down an absolute ban" on the use of sound amplifying devices. But such suggestions do violence to what is a clear expression in the ordinance not to prohibit, but to permit within reasonable bounds, the full and complete exercise of the constitutional right of free speech.

Stripped of the surrounding verbiage, the pertinent portion of Section 4 of the ordinance, and it is this Section which is under attack, reads as follows:

> "It shall be unlawful * * * to play, use or operate * * * on the public streets * * * a sound truck * * * *which emits therefrom loud and raucous noises.*" (Emphasis supplied.)

Sound trucks, per se, are not banned. Only sound trucks *which emit loud and raucous noises* are prohibited from operating on public streets, *and it was for this offense that appellant was arrested, tried and convicted.*

Not only does appellant beseech this Court to extend the right of free speech to include the use of a sound truck as an inalienable part of that right, but apparently it is also

being requested to extend the doctrine to include "loudness and raucousness" as an inseparable component of that basic constitutional freedom.

It is submitted that if the imputations which appellant attributes to the ordinance are correct, the ordinance would have provided that "it shall be unlawful to play, use or operate on the public streets a sound truck" with no subsequently qualifying provision as to the *manner* in which sound trucks may or may not be operated.

But the ordinance does not so read, for it sets up a dividing boundary line beyond which the police power of the state may not go and the extent to which civil liberties will be protected. The ordinance only creates a "blanket" ban on the use of sound trucks *when such use becomes "loud and raucous"*. As stated in *Cox v. New Hampshire*, 312 U. S. 569, 61 Sup. Ct. 762, 85 L. ed. 1049, 133 A. L. R. 1396 (1941), and as quoted in a dissenting opinion in the case of *Saia v. People of the State of New York*, 334 U. S. 558, 68 Sup. Ct. 1148,——L. ed——(1948),

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society *maintaining public order* without which liberty itself would be lost in the excesses of unrestrained abuses." (Emphasis supplied.)

Mr. Justice *Holmes* realized the seriousness of extending the constitutional rights protected under the Fourteenth Amendment so as to devitalize the police powers of the states and in *Baldwin v. Missouri*, 281 U. S. 586, he sounded his concern in the following language:

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what

> I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."

Clearly, our society is and must continue to be sufficiently broad to encompass, primarily the protection of the freedoms, and secondarily, but concurrently, the exercise of the vitality of the states' authority—the police powers.

(b) The ordinance does not create a previous restraint upon the exercise of any constitutional right.

The vice of the legislation which was invalidated in the case of *Saia v. People of the State of New York,* supra; *Cantwell v. Connecticut,* 310 U. S. 296, 60 Sup. Ct. 900, 84 L. ed. 1218 (1940); *Lovell v. Griffin,* 303 U. S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938); and *Hague v. C. I. O.,* 307 U. S. 496, 59 Sup. Ct. 954, 83 L. ed. 1423 (1939), is non-existent in this case. In *Saia v. People,* supra, an effective previous restraint was held to exist where it was necessary to secure a permit from the Chief of Police before a sound truck could be operated. In *Cantwell v. Connecticut,* supra, a statute which prohibited solicitation for religious, charitable, or philanthropic causes without prior approval of the secretary of the public welfare council was declared invalid as an intolerable previous restraint upon the freedom of religion. In *Lovell v. Griffin,* supra, it was held that an ordinance which prohibited the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the city manager was "void on its

face," the Court remarking that "while this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." In *Hague v. C. I. O.*, supra, an ordinance which required a permit from a local official as a condition to a public assembly was also declared void on its face as a previous restraint on constitutionally guaranteed freedom of speech.

In all the cases just cited, a previous restraint was clearly placed upon constitutionally guaranteed freedoms. In the case at hand, however, there is no such previous restraint upon the use of sound trucks on the public streets of the City of Trenton, nor to the exercise of the right of free speech. The sole condition, and this condition is not a "previous restraint," is that *after* the sound amplifying equipment of a sound truck begins to operate on the city streets, it will not do so *loudly or raucously.* The restraint, if in fact any at all be deemed to exist, is impossible not by any public official, but by the very person who is seeking to exercise his constitutional rights. *He* must insure that his activities do not become "loud and raucous". If the previous restraint doctrine would extend to such a condition, then "loudness and raucousness" would become an inseparable and inviolable part and parcel of the right of free speech. If such were the case, one could quite successfully contend that since the ordinance does not permit loudness and raucousness, there is a restraint on the free exercise of speech which is guaranteed by the Federal Constitution. Such a result, it is obvious, would extend it to those limits which this Court of *Chaplinsky v. New Hampshire*, 315 U. S. 568, 62 Sup. Ct. 766, 86 L. ed. 1031 (1942), has declared cannot be included in the right of free speech. In

the *Chaplinsky* case, free speech was held not to include the right to utter obscenities, the right being clearly limitable.

(c) The ordinance does not establish any type of administrative censorship.

As this Court has pointed out in the *Saia*, *Cantwell*, *Lovell*, and *Hague* cases, supra, administrative censorship of constitutional liberties cannot be tolerated as such censorship could amount to the absolute suppression of, or serious limitation to, these liberties.

But an examination of the decisions of this Court which have stricken down measures establishing administrative censorship discloses that *permits were required prior* to the exercise of freedom of speech, freedom of assembly, or freedom of religion. And the issuance of these permits was made a matter of administrative discretion. The defect in these measures was, thus, subjection of a constitutional right, or the exercise thereof, to the uncontrolled discretion of a public official who, as he desired, could restrain or censor completely the exercise of such inherent rights.

It is submitted that the complete absence of any possibility of censorship in the ordinance places this case in an entirely different category from the landmark decisions, heretofore cited, on the administrative censorship of constitutional freedoms, and cannot be decided upon the authority of those cases.

Point II.

The right of freedom of speech does not embrace the right to use a sound truck, much less the right to use such sound truck in a "loud and raucous" manner.

The case of *Saia v. People of the State of New York*, supra, has been invoked as the basis for contending that the right of free speech embraces the right to use a sound truck. In effect, appellant goes further. He urges that such sound truck may operate "loudly and raucously" as a part of the right of free speech. But what does the *Saia* case decide?

The majority opinion, after outlining the facts, states that the ordinance is unconstitutional because "it established a previous restraint on the right of free speech"; that to use a loud-speaker, "one has to get a permit from the Chief of Police"; and that "there are no standards prescribed for the exercise of his discretion." Thus far, the decision clearly follows the *Cantwell, Lovell,* and *Griffin* cases, *supra*. Then the majority states, after reciting the holdings in those three cases, that the ordinance *"has the same defects."* The Chief of Police "stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal." The decision is made. Nothing further is necessary to the conclusion reached. The Court found an "effective" previous restraint and struck it down. The rest is dicta.

Upon the language of the ensuing paragraphs appellant seeks to base and sustain his position that the right of free speech includes the right to operate a sound truck "loudly and raucously." Appellant overlooks one salient feature of this language and that is that the Supreme Court *did not*

express its willingness in the *Saia* case to extend the right of free speech to the use of "loud and raucous" sound trucks.

The Court recognized the place in modern society for the loud-speaking device and its peculiar characteristics of being able to "reach" the people. Similarly, the Trenton ordinance recognizes the usefulness of these devices, because it authorizes their operation. The *Saia* case did not say that the loud speaker could be used "loudly and raucously." In fact, the majority explicitly recognized that the manner of their use could be locally regulated. It said, "Noise can be regulated by regulating decibels." And what are decibels? The measure of volume. The standard applied. The line at which police power regulations and civil liberties meet and do not conflict. And what does the Trenton ordinance do? It regulates decibels. It specifies "loudness and raucousness" as the standard beyond which noise from sound trucks may not go; as the line beyond which civil liberties invade the proper, regulable sphere of the police power. It, in short, complies with the method which the majority in the *Saia* case approved.

If appellant's position were sustained, it would be impossible to "regulate noise by regulating decibels" which the Supreme Court has said municipalities may do, for the present objections run to the extent or the manner in which sound trucks may be regulated. And the extent or manner has been prescribed by the ordinance as not "loud and raucous."

The ordinance permits all noises emanating from sound trucks except those noises which are "loud and raucous." On its face, a reasonable standard is created.

Appellee contends, therefore, that this Court has not, and should not, extend the right of free speech to include the right to use a sound truck, or to use any sound amplifying device in a "loud and raucous" fashion.

Point III.

Section 4. of the ordinance is specific, clear, definite and certain.

Appellant in his brief under Summary of Argument, page 33, contends that Section 4, of the ordinance is obscure, vague and indefinite, so as to make them impossible of reasonable interpretation, and for those reasons the same is unconstitutional.

In an attempt to establish such contention appellant cites and repeats some of the provisions of other and distinct sections and provisions of the ordinance in question not contained in Section 4, which as hereinabove stated is the only portion of the ordinance in issue in the case at bar. Attention of the Court being called to the fact that Section 4 contains no reference whatsoever to necessary or unnecessary noises; to what is reasonable or unreasonable; what is harsh, prolonged or unnatural or unusual; or what amounts to annoyance or inconvenience of persons. All of said phrases and provisions being contained in other sections of the ordinance not before the Court in the case at bar. All that Section 4 deals with and prohibits is the use of sound trucks on the public streets which emits therefrom *loud and raucous noises*.

Appellee, therefore, submits that even if there was any merit to said contentions, as to the other sections of the ordinance in question, they have no applicability to the case before the Court. It being submitted that no authority need be cited to establish to this Court that:

> "The review of an entire ordinance will not be made where the appellant is affected by only a single feature

of the same," and "Where the portion of an ordinance which is or may be invalid is distinctly separable from the remainder, and the remainder in itself contains the essentials of a complete enactment, the invalid portion may be rejected and the remainder may stand as valid and operative."

As to the contention of the appellant that Section 4 of the ordinance is obscure, vague and indefinite, appellee submits the answer of the Supreme Court of New Jersey in the case at bar to said contention, contained in the Transcript of Record, page 15:

"There is no merit to the contention that the ordinance is so obscure, vague and indefinite as to violate Section 1, Article 1 of the New Jersey Constitution and the Fourteenth Amendment of the Federal Constitution.

"Only Section 4 of the ordinance, upon which the prosecutor was convicted, is relevant. In simple, unambiguous language it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint. The phraseology of the statute should leave no doubt in the mind of anyone of common intelligence as to what is forbidden."

CONCLUSION.

Appellee does not question the fact that public streets, parks, highways and plazas are natural and proper places for the dissemination of ideas and information. Nor does appellee argue with the proposition that an interference

with the right to be heard might invade the constitutional right of freedom of speech. Appellee does seriously question, however, the right of an individual to employ a sound truck "loudly and raucously" on city streets. If such operation could be considered a valid exercise of constitutional liberties, all police power measures which, in any fashion, merely touch these liberties, would be required to be stricken down. Such a result would swiftly lead to the chaotic conditions which have been recognized as culminating in the disintegration of the states' police powers and the ultimate downfall of the Constitution and its protective amendments which are now being invoked.

True, civil liberties must be maintained in a highly preferred position. But civil liberties and police power regulations are not irreconcilable. Each can occupy their respective orbs and at the same time maintain their individual integrity. Neither need be sacrificed for the other. If the police power prohibition of "loud and raucous" noises emanating from sound trucks invades the sphere of civil liberties, then it is clear that the field has been so completely preempted by civil liberties that a complete discarding of the police power rights of states would be necessitated.

To argue that the ordinance in this case is not a regulation, but a "complete" prohibition is in apposition to the very terms of the ordinance itself for the "sole" prohibition is loudness and raucousness. Sound trucks may be operated on the public streets of the city; loud speakers mounted upon such trucks may disseminate the opinions of their owners or operators; and sound trucks may, without previous restraint and without administrative censorship, freely move about. To read the ordinance otherwise is to distort its terms and its clearly-expressed intention. To say that the Trenton ordinance is "identical" with the ordi-

nance declared void in the *Saia* case, supra, reflects a failure to distinguish between the character of two ordinances which are widely separated in their methods of regulation.

Appellee therefor submits that "loud and raucous" noises emitted from sound trucks properly belongs to that field of prohibition which the state under its police power can regulate and that the ordinance here under attack is constitutional and valid and this appeal should be dismissed.

Respectfully submitted,

LOUIS JOSEPHSON,
Counsel for Appellee.

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 505

CHARLES KOVACS, *Appellant*,

v.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN OF ITS AFFILIATED ORGANIZATIONS, AMICI CURIAE

LEE PRESSMAN,
General Counsel,
FRANK DONNER,
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Congress of Industrial Organizations,
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Gladstein, Andersen, Resner & Sawyer, Gen'l Counsel
International Longshoremen's & Warehousemen's Union
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Textile Workers Union of America
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United Automobile, Aircraft and Agricultural Implement Workers of America
Henry Mayer, General Counsel
Telephone Workers Organizing Committee
Meyers, Meyers & Rothstein, General Counsel
United Farm Equipment & Metal Workers of America
Victor Rabinowitz, General Counsel
American Communications Association
David Rein, General Counsel
Food, Tobacco, Agricultural and Allied Workers Union of America
Benjamin Robinson, General Counsel
Amalgamated Lithographers of America
David Scribner, General Counsel
United Electrical, Radio and Machine Workers of America
Benjamin C. Sigal, General Counsel
United Gas, Coke and Chemical Workers of America
Witt & Cammer, General Counsel
International Fur and Leather Workers Union
International Union of Mine, Mill and Smelter Workers

IN THE

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MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN OF ITS AFFILIATED ORGANIZATIONS, AMICI CURIAE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

This memorandum is filed, pursuant to the consent of all parties, in accordance with Rule 27 (9) of this Court.

INTEREST OF PARTIES FILING THIS MEMORANDUM

This case involves the validity of a Trenton, N. J., ordinance prohibiting the use of loud speakers on the public streets and does not present any issues with respect to the extent to which the use of such devices may be regulated in the public interest.

The issues of law raised by the instant appeal are of the utmost importance to the Congress of Industrial Organizations, its affiliated organizations and their members. As will be indicated in this memorandum loud speakers are indispensable to labor organizations and their members as a means of effective communication. The ordinance now before the Court

is typical of a large group of ordinances which have seriously impaired the exercise by workers and their labor organizations of the right of free communication.

MEMORANDUM

In recent years amplifying systems have become increasingly important to the labor movement.

Loud-speaking devices have assumed a critical importance in the field of communication with respect to labor issues and controversies for a number of reasons.

In the first place, the sheer size and physical magnitude of a plant in such an industry as auto, textile and steel makes the use of these devices imperative in order to reach an audience of workers in the plant or going to the plant. Amplification of the speaker's message is necessary in order to reach the physically dispersed audience in a modern plant or factory.

In the second place, amplification is frequently the only way in which a union can bring its message to the workers in a plant where ingress and egress are controlled by a hostile employer. Many modern plants are frequently situated on private property and policed by private guards who bar access to union representatives. It therefore becomes necessary, where this situation prevails, to use amplification in order to send a message from a point outside of the area controlled by the employer.

A related problem frequently arises where access is denied (or so severely limited as to be rendered ineffective) by injunctions which restrain or regulate the number, conduct and message of pickets.

In the third place, amplification is vital in the field of industrial communication where the need is to reach a particular type of audience. For example, the facts with respect to labor controversies in areas which involve service to the public can most effectively be brought home to the public, upon whose attitude the outcome of the controversy may turn, through the use of some form of amplification. It is obvious that the message of a picket patrolling an establishment on a crowded street will be far less effective for this purpose than the same message broadcast through a loud-speaking device.

Finally, whether the need be to reach an audience which is physically dispersed, geographically removed, or of a particular character, there can be no denying the fact that a message broadcast through amplifying equipment carries a unique urgency and dramatic quality.

We believe that the ordinance before the Court in the instant case is condemned by a long series of cases decided by this Court. The ordinance, in our view, cannot survive the principles enunciated by this Court in *Hague* v. *C. I. O.*, 307 U. S. 496. And the decision of the Court in *Martin* v. *Struthers*, 319 U. S. 141, cannot be reconciled with the justification supplied for the validity of the ordinance by the New Jersey Supreme Court.

The use of loud-speaking equipment involves fundamentally an attempt to exercise the right of free speech in an effective and realistic manner. This Court has frequently recognized that the protection of civil rights involves a protection of those rights through forms most appropriate to their exercise. *Cf. Gompers* v. *U. S.*, 283 U. S. 604, 610.

The decision of the New Jersey Supreme Court, however, withholds constitutional protection at precisely the point where protection is most needed, namely, where the exercise of the right is most effective.

Ordinances of the type here in issue have been passed by a growing number of municipalities in the United States. A few representative examples of these ordinances are collected in the Appendix to this Memorandum. If the decision of the New Jersey Supreme Court is left standing it will serve to invite the passage of ordinances in other municipalities limiting or prohibiting the use of sound equipment.

We urge that the Court note probable jurisdiction in the instant case and invalidate the ordinance.

We are aware that the Court has noted probable jurisdiction in *Saia* v. *People of New York*, No. 504, this Term. However, it should be pointed out to the Court that the ordinance involved in that case differs sharply from the Trenton ordinance. Under the ordinance involved No. 504 certain types of public dissemination through loud-speaking devices are per-

mitted upon permission from the Chief of Police. In the present case all forms of communication are outlawed.

Moreover, the present case involves the use of loud-speaking equipment upon a public street while the facts in No. 504 involve the use of such equipment in a public park.

Respectfully submitted,

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General Counsel,
FRANK DONNER,
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Congress of Industrial Organizations, and United Steelworkers of America.

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Benjamin C. Sigal, General Counsel
United Gas, Coke and Chemical Workers of America
Witt & Cammer, General Counsel
International Fur and Leather Workers Union
International Union of Mine, Mill and Smelter Workers

APPENDIX

MUNICIPAL ORDINANCES PROHIBITING OR LIMITING THE USE OF LOUD-SPEAKING EQUIPMENT

Chicago, Illinois (Section 99-56 of the Municipal Code)

No person shall make, or cause, permit or allow to be made, upon a public way, or in such close proximity to a public way as to be distinctly and loudly audible upon such public way, any noise of any kind by crying, calling, or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, wind instrument, sound amplifier, or similar mechanical device; provided, that the said restrictions shall not apply to any licensed peddler crying or calling for the purpose of advertising goods, wares or merchandise when lawfully using any public alley in the city between the hours of 11 a. m. and 6 p. m.

Concord, North Carolina

Section M. The use of any drum, loud speakers, or other instrument or device for the purpose of attracting attention by creation of noise to any performance, show, sale, display or advertisement of merchandise.

Section N. The use of mechanical loud speakers or amplifiers on trucks, airplanes or other vehicles for advertising or other purposes except where specific license is received from the city. (Chief of Police)

Ilion, New York

NOTICE OF ORDINANCE

At a regular meeting of the Board of Trustees of the Village of Ilion held at the Municipal Building on the 19th day of March, 1941, all members being present as follows: Oliver S. Coleman, President; Trustees Lester, Lory, Miller and Morrison, the following ordinance was duly presented and adopted:

Section 1. This ordinance shall be known as an ordinance to regulate the use of radio, musical instruments, mechanical

musical instruments, loud-speaking devices and all other sound-producing devices whereby sound is cast or propelled upon the public streets and places in the Village of Ilion.

Section 2. No person, firm or corporation shall operate or play or cause to be operated or played in or upon any building, street, premises, vehicle or thing of whatsoever name and nature, any radio, mechanical musical instrument, musical instrument, loud-speaking devices of whatever name or nature, whereby sound therefrom is cast or propelled upon the public streets and places in the Village of Ilion or upon adjoining or other premises therein, and the peace, repose, comfort and health of travelers upon the public streets or public places in the Village of Ilion or persons in or upon neighboring or other buildings and premises is disturbed.

Section 3. The terms peace, repose, comfort and health of travelers upon public streets or places in the Village of Ilion or persons in or upon neighboring or other premises as used in the foregoing section shall be deemed to be disturbed if the sound be heard a distance of twenty-five feet from its source, or if the public thoroughfare is obstructed or caused to be obstructed by reason thereof.

Section 4. The disturbance of the peace, repose, comfort and health of travelers upon public streets or places in the Village of Ilion or persons in or upon the neighboring or other premises shall be deemed a nuisance and may be abated forthwith, and the person, firm or corporation causing such disturbance shall be deemed to be disorderly persons.

Section 5. This ordinance shall not apply to the lawful use of horns or other warning devices used upon motor vehicles for the purpose of warning the traveling public or to church and school bells and chimes, and chimes on public clocks, nor to the use of loud speakers and other sound devices in connection with all lawful assemblies, election campaigns or by the Village of Ilion, its officers, servants and employees. The use of loud speakers and other sound devices in connection with lawful assemblies and election campaigns shall be permitted only upon written permission of the Clerk of the Village of Ilion upon application duly made prior to such use or proposed use stating the time when and place where the use thereof.

is contemplated. No permission, in any event, shall be granted if the use thereof shall in any manner interfere with the use of the public streets and places in the Village of Ilion.

Section 6. Any person, firm or corporation violating this ordinance shall forfeit any pay to the Village of Ilion a sum not to exeeed One hundred dollars, and in addition thereto shall be deemed a disorderly person and as such punishable by a fine not to exceed One hundred dollars.

Section 7. This ordinance shall take effect immediately.

The adoption of the above ordinance was moved by Trustee Lory and seconded by Trustee Miller, and upon being put to a vote by President Coleman, the following trustees voted "Aye": Trustees Lester, Lory, Miller and Morrison, and there was no negative vote.

ROY W. BENNETT,
Village Clerk.

Schenectady, New York

Radios, Phonographs, Etc., Regulating Use of Radio (Sound Making)

Ordinance No. 6764

An Ordinance governing the use of Radios, Phonographs and other mechanical or electrical sound-making or reproducing devices, instruments or machines.

Section 1. No person occupying or having charge of any building or premises, or any part thereof, in the City of Schenectady, N. Y., for business purposes, excepting for the manufacture of the herinafter described articles, shall cause, suffer or allow any radio, phonograph or other mechanical or electrical sound-making or reproducing device, instrument or machine, including so-called loud speakers, to be used or operated on said premises, nor in connection therewith, so that the sound therefrom shall be heard by persons in the streets or elsewhere outside of said premises so as to annoy or disturb them or be injurious to their health or comfort, except as hereinafter provided.

Section 2. The Mayor, in his discretion and upon payment by the application of a fee of One ($1.00) Dollar, may issue for

a specified length of time, permits for the operation of loud speakers in connection with the broadcasting of events of general local interest, and applications for such permits shall be made in writing and shall be signed by the person having charge or control of the premises upon which, or within which, such loud speakers are to be used or operated, and shall contain a statement giving the location of the said premises, the nature of the business transacted thereon, and the hours during which it is desired to operate the said instrument.

Section 3. Every person offending against the provisions of this Ordinance shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than Twenty-five ($25.00) Dollars for each offense; each day or part of each day that this Ordinance shall be violated shall constitute a separate offense.

Section 4. This Ordinance shall take effect immediately after publication thereof, three a week for two successive weeks in the official newspaper.

Section 5. This Ordinance may be known and cited by the following short title, "RADIO, PHONOGRAPHS, ETC., REGULATING USE OF RADIO (SOUND MAKING)."

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United States Supreme Court

OCTOBER TERM, 1948

CHARLES KOVACS,
Appellant,
against
ALFRED COOPER, JR., Judge of the First District Police Court of Trenton,
Appellee.

No. 9

APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
OSMOND K. FRAENKEL,
Counsel.

JAMES A. MAJOR,
EMIL OXFELD,
SAMUEL ROTHBARD,
Of the New Jersey bar,

STANLEY H. LOWELL,
Of the New York bar,
Of Counsel.

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United States Supreme Court

OCTOBER TERM, 1948

CHARLES KOVACS,
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against

ALFRED COOPER, JR., Judge of the First District Police Court of Trenton,
Appellee.

No. 9

APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

Preliminary Statement

This brief is submitted by the American Civil Liberties Union, an organization with whose principles and ideals this Court is more than familiar.

As *amicus curiae*, we submit to this Court that the ordinance under which this appellant was convicted is unconstitutional in derogation of the First and Fourteenth Amendments to the Constitution.

Facts

The appellant was speaking with the aid of a sound amplifying device (loudspeaker) on the street in the City

of Trenton during a labor dispute. The loudspeaker was attached to a motor vehicle. The appellant was arrested, tried and convicted for violation of Trenton Ordinance No. 430 (4), entitled "An Ordinance to Prevent the Making of Unnecessary Noise." The pertinent section states as follows:

> "That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or about the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicles operated or standing upon said streets or public places aforementioned."

The New Jersey courts upheld the conviction.

ARGUMENT

The ordinance under which appellant was convicted is unconstitutional.

We are here concerned with this problem: whether the absolute prohibition by a municipality of a right that this Court has held cannot be left to the unbridled discretion of a local official is not also abhorrent to the Constitution. The First Amendment provides in part:

> "Congress shall make no law respecting the establishment of religion nor prohibiting the free exercise thereof, nor abridging the freedom of speech or of the press. * * *"

These prohibitions have been extended by the Fourteenth Amendment to the action of a State or an agency thereof. *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105.

The ordinance of this municipality of the State of New Jersey with which we are herein concerned completely prohibits the use of a loudspeaker upon the streets of the City, no matter what the purpose.

Two questions are, therefore, posed by the case at bar. First, whether the ordinance in issue is a proper control of the use of the streets, and second, whether the use of loud speakers is an integral part of the exercise of the right of free speech.

The argument has been made before and doubtless will be made herein that a municipality properly may foreclose the use of its streets and other public gathering places in the interest of cleanliness or traffic control. This Court has considered this position before and emphatically rejected it.

> *Young* v. *People of the State of California*, 308 U. S. 147;
>
> *Snyder* v. *City of Milwaukee*, 308 U. S. 147;
>
> *Nichols* v. *Commonwealth of Massachusetts*, 308 U. S. 147.

> "Although a municipality may enact regulations in the interest of public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion."
>
> *Schneider* v. *State of New Jersey, Town of Irvington*, 308 U. S. 147, 160.

Whatever legislation may be enacted by a municipality or State, it must not limit the constitutional liberty of one rightfully upon the street to impart information through

speech or the distribution of literature. An absolute prohibition such as in the case at bar is not justifiable.

Schneider v. *State of New Jersey, Town of Irvington, supra.*

Moreover, when a State has enacted an ordinance granting unlimited discretion to a local public official before a license could be obtained to distribute literature, religious or otherwise, or to speak or assemble, this Court has acted in firm protection of our freedom of religion, press, speech and assembly.

Cantwell v. *Connecticut,* 310 U. S. 296;
Lovell v. *City of Griffin,* 303 U. S. 444;
Hague v. *C.I.O.,* 307 U. S. 496.

Recently this view was followed and strengthened where a loudspeaker permit was available under an ordinance only by "permission obtained from the Chief of Police."

People v. *Saia,* 334 U. S. 558.

In the case at Bar the City of Trenton does not permit even the slightest breach in the wall of silence its municipal authorities have thrown around it. No discretion, however abused and arbitrary, is even permitted to a police official. The City Council has decided that no sound amplifying device can ever be used whatever the circumstances.

In *People* v. *Saia, supra,* the Court said:

> "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. *It is the way people are reached.*" (Italics added.)

This case is *a fortiori* of the *Saia* case. If loud speakers are "indispensable instruments of effective public speech" —as they are—a complete prohibition of their use, eliminating even the tiny area contained within official discretion, is that much more to be condemned. We submit with this Court that:

> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes."
>
> *People* v. *Saia, supra.*

Modern society has created for our use a further technological advance which has become an essential part of our basic right to full and complete freedom of speech. We cannot reject its use in the supposed interest of 19th Century peace and quiet. Only upon a more informed people can we build a better and more satisfying democracy.

CONCLUSION

The conviction of the appellant should be reversed and the appellant discharged.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
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Counsel.

JAMES A. MAJOR,
EMIL OXFELD,
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October Term, 1948.

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No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

PETITION FOR REHEARING.

GEORGE PELLETTIERI,
Counsel for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Now comes the appellant in the above cause and presents his petition for rehearing, as provided by the rules of this Court. As grounds he shows the Court the following:

GROUNDS.

I.

This Court erred in refusing to reverse the judgment of the State Court because it summarily and erroneously assumed that there was evidence of "loud and raucous noises" whereas it is clear, both in the record and from the findings and opinions of the Courts below, that appellant was not charged with making or broadcasting "loud and raucous noises," that there was no evidence whatsoever that he did make or broadcast "loud and raucous noises" and that there was no finding in the Courts below that he was guilty of making or broadcasting "loud and raucous noises."

II.

Grave error was committed by this Court in refusing to reverse the judgment of the State Court for the reason that it was the conviction of appellant under the challenged ordinance that was attacked on this appeal and *the ordinance as construed and applied and enforced, is unconstitutional and void* in that it abridges appellant's freedoms of speech, press, assembly and to communicate information and opinions to others contrary to the First and Fourteenth Amendments of the United States Constitution.

DISCUSSION.

Appellant was apprehended and brought to trial in the First District Police Court of Trenton, New Jersey, on a complaint made by Patrolman V. Domanski, a police officer of the City of Trenton. This complaint initiated this proceeding. It charged specifically that "Charles Kovacs did violate the 4th Section of an Ordinance of the City of Trenton, No. 430, entitled 'An Ordinance to Prohibit the Making of Unnecessary Noise,' *in that he did, on South Stockton Street, in said City, play, use and operate a device known as a sound truck*" [3].[1] No complaint was made of appellant making or broadcasting "loud and raucous noises."

The only evidence produced against the appellant consisted of the testimony of the complainant, Patrolman Domanski who testified [4]: "That he was on his post in the vicinity of Hanover and N. Stockton Streets, when he heard a sound truck broadcasting music. That he went in the direction of said sound and located said truck on the Stockton Street side of the Municipal Building. That as he approached said truck, the music stopped and he heard a man's voice broadcasting from said sound truck. That he thereupon went over to said truck, informing the occupants, the driver and Charles Kovacs, the defendant, that

[1] All figures appearing in brackets herein denote pages of the printed record.

they were violating the sound ordinance of the City. That he then placed the defendant, Charles Kovacs, and the driver, Paul Nagy, under arrest."

The appellant admitted that he was the person who set the mechanism in said truck playing music and that he did speak into the sound mechanism [4].

Not one iota of evidence was produced that appellant's operation of the sound truck resulted in the emission therefrom of "loud and raucous noises." No testimony at all was given on that question.

The Police Justice, Albert Cooper, Jr., upon the foregoing evidence, convicted appellant "of the offense charged against him in said complaint" [5]. The offense so charged, as previously stated, was solely that appellant "did, • • •, play, use and operate a device known as a sound truck" [3].

It is thus clear from the record of the Court of original jurisdiction, the Police Court of the City of Trenton, that appellant was neither accused nor convicted of operating a sound truck that emits "loud and raucous noises." The charge and conviction was of the operation of "a sound truck." The record is barren of any evidence to prove that "loud and raucous noises" were emitted. It is apparent that that was not the issue tried before the Court. The record discloses that the case was prosecuted and tried by the City and the conviction had upon the theory, advanced by it and adopted by the Police Judge, that under the ordinance the operation of a sound truck *per se* was forbidden and that it was not necessary for the City to establish that the sound truck emitted "loud and raucous noises."

The same theory was adopted and followed by the Supreme Court of New Jersey to which Court appellant then took his conviction for a review. That Court affirmed the conviction of the offense charged against appellant, that is, the use and operation of a sound truck. It stated, referring to the ordinance and the offense charged [15]:

> "In simple, unambiguous language *it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint.* The phraseology of the statute should leave no doubt in the mind of anyone of common intelligence as to what is forbidden." *Kovacs v. Cooper,* 135 N. J. L. 64, 69.

That the New Jersey Supreme Court construed the conviction below and its affirmance of that conviction to constitute an absolute prohibition of the mere use and operation of a sound truck without regard to "loud and raucous noises" is amply clear from a reference to its opinion. The Court said [12]:

> "The freedoms of expression and assembly of the prosecutor may have been prohibited in this respect, but *the ordinance leaves untouched the right of the prosecutor to express his views orally without the aid of an amplifier.*" 135 N. J. L. p. 66.

The Court undoubtedly considered its judgment to be an affirmance of the conviction of appellant on the only offense charged, the mere use of the sound truck, without regard to the volume of sound emitted, and intended that the judgment should constitute an absolute ban on the use of all sound devices in the City of Trenton.

The New Jersey Court of Errors and Appeals, the next Court on the appeal, affirmed the conviction by an equally divided Court. No disagreement with the Supreme Court's opinion was noted by any one of the affirming judges. Those judges too intended their judgment to constitute an absolute ban on the use of sound trucks without regard to "loud and raucous noises." However, Mr. Justice Colie, who voted to reverse, wrote an opinion in which, while agreeing that the prohibition against making "loud and raucous" noises is a reasonable regulation, he called attention to the fact that [24]:

> "The prohibition is against the emitting of 'loud and raucous' noises and applies equally to each of the enumerated categories, i. e. sound truck, loud speaker, sound amplifier, radio or phonograph with loud speaker or sound amplifier, calliope or any other instrument. The only evidence before the trial court was that a patrolman heard a sound truck broadcasting music and heard a man's voice broadcasting from the sound truck. *There is not a scintilla of evidence that the music or voice was loud or raucous, and under the wording of Section 4 such proof is an essential prerequisite to a finding of guilt of a violation.*" *Kovacs v. Cooper*, 135 N. J. L. 584, 585.

The record and the findings and opinions of the Courts below demonstrate that appellant was charged, tried and convicted simply and solely of the use and operation of a sound truck under an interpretation by those Courts that the ordinance in question constituted an absolute prohibition of the use of amplifying mechanism without regard to volume of sound. The New Jersey Supreme Court as well as the Court of Errors and Appeals affirmed on that interpretation.

There was no charge made, no evidence submitted and no conviction had of making or broadcasting "loud and raucous noises." The New Jersey Courts did not conclude that the evidence of search by the patrolman to locate the sound truck on the street was sufficient evidence of loudness and raucousness. They did not even consider that question. The record discloses, without question, that they proceeded upon the theory and interpretation that the ordinance was an absolute ban against the use of sound amplifying devices. They had no intention of applying the ordinance as a regulation of the volume of sound to be emitted from a loud speaker. But rather construed and applied the ordinance upon an assumption that *all* sound amplification constitutes "loud and raucous noises" and is therefore forbidden.

This Court has decided the case as though the ordinance was being attacked only upon its face. This is not so. It is the conviction of the appellant under the ordinance that we have attacked in addition to the fact that we attacked the ordinance upon its face. It is our contention that the ordinance is invalid upon its face, but also unconstitutional and void as construed and applied (Argument K, Brief for Appellant, pp. 11, 27).

It is the duty of the Court to determine whether, even assuming that an ordinance is valid upon its face, it may be unconstitutional as construed and applied to the circumstances of the case.

> "Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another." *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 545.

Mr. Justice Reed in the opinion announcing the judgment of the Court, in which the Chief Justice and Mr. Justice Burton joined, assumes that the Courts below found that the amplifier of the truck emitted "loud and raucous noises." The record, as we have pointed out, discloses that the Courts below did not thus find. Nor is there evidence to support that there was an implicit finding.

Since the City is limited in its prohibition to "loud and raucous noises," a conviction, such as here, where there was a mere showing of the use of sound devices would not *per se* constitute an evidence to constitutionally justify such a conviction.

The assumption by the Court that this was a conviction for "loud and raucous noises" is entirely without foundation or justification.

Mr. Justice Reed has misinterpreted our brief in footnote 7 of the opinion. We did not intend to tell the Court that Kovacs was convicted because he played the loudspeaker

with "loud and raucous noises." We submit that he was convicted under Section 4 of the ordinance because he played the loudspeaker and that the use of the loudspeaker does not *per se* constitute a "loud and raucous" noise.

Mr. Justice Reed, the Chief Justice and Mr. Justice Burton have assumed certain facts, that appellant was convicted of making "loud and raucous noises," upon the existence of which facts depends the validity of the appellant's conviction. The existence of such facts should not be presumed and such assumption is erroneous and unlawful. The burden of proof in this case is upon the city to show "loud and raucous noises." The city has wholly failed to make proof of "loud and raucous noises." See, *Busey v. District of Columbia*, 78 U. S. App. D. C. 189, 138 F. 2d 592 (executing mandate at 319 U. S. 579); *United States v. Carolene Products Co.*, 304 U. S. 144, 152; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638-640; *Thomas v. Collins*, 323 U. S. 516, 529-530.

The rule was effectively stated in *Busey v. District of Columbia, supra*, where the Court of Appeals upon reconsideration, held:

> *"We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts, which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded.* • • • No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms."

This Court has established the rule, in a long line of decisions, that the burden is upon the State to prove an

abuse of the rights justifying the abridgment of the freedoms of speech, press and assembly. It is the failure of the State to make such proof here that we contend entitles the appellant to a reversal.

Whether a State statute is valid or invalid under the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid where given another. *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535, 545.

When an attack is made upon a statute that it is unconstitutional as construed and applied, it is the duty of the Supreme Court of the United States to make an independent examination of the record and testimony in the case to determine the necessary federal questions from the facts. *Sterling v. Constantin*, 287 U. S. 378; *Fiske v. Kansas*, 274 U. S. 380; *Pennecamp v. Florida*, 328 U. S. 431; *Haley v. Ohio*, 332 U. S. 596.

The Court stated this principle in *Sterling v. Constantin*, as follows (287 U. S., p. 398):

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. . . . Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of federal right."

And in *Fiske v. Kansas, supra*, it was said (274 U. S. p. 385):

> "The inquiry then is whether the statute is constitutional as applied and enforced in respect of the

situation presented. *Ward & Gow v. Krinsky*, 259 U. S. 503, 510; *Cudahy Co. v. Parramore*, 263 U. S. 418, 422. And see *St. Louis, &c., Railway v. Wayne*, 224 U. S. 354, 359.

"And this Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 593; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 394; and cases cited."

(And at p. 387):

"The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment."

We repeat that the record is barren of one iota of evidence of the production by appellant of "loud and raucous noises" through his sound truck. The record shows conclusively that the trial court made no such finding of the emission of "loud and raucous noises" from the sound truck. The charge was only of the use and operation of a sound truck [3]. The evidence produced was directed at proving and did in fact prove only that charge, i. e., the use and operation of a sound truck [4]. The trial court found appellant guilty solely of that charge [5]. This Court

erroneously assumed evidence and findings of "loud and raucous noises."

If we are wrong in this contention, then certain it is that the conviction made in the trial court and the decisions of the Supreme Court of New Jersey and the Court of Errors and Appeals of New Jersey were based upon the playing of a loudspeaker as the basis of the conviction and not that there was evidence of "loud and raucous noises." Since the appellant was not convicted of making "loud and raucous noises" in the state courts, the conviction in the Supreme Court of the United States has been changed from the use of a sound truck to the making of "loud and raucous noises", which is the first time that the appellant has been charged or convicted of such a crime.

This Court recently condemned such procedure in a state court as a denial of procedural due process in *Cole v. Arkansas*, 333 U. S. 196, where the opinion of the Court stated (p. 201):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In re Oliver*, 333 U. S. 257, 273, decided today, and cases there cited. * * * It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge v. Oregon*, 299 U. S. 353, 362."

(And p. 202):

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> "We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process

of law—safeguards essential to liberty in a government dedicated to justice under law."

The same principle which the Court enunciated in *Cole v. Arkansas, supra,* is controlling here. This Court has violated the rights of the appellant to procedural due process in criminal cases by affirming his conviction upon a ground of which he was never aware and upon a ground on which the state courts never relied at all.

It is true that no attempt was made to attack the sufficiency of the complaint. But it is not the complaint that makes the evidence. Whether there is evidence to support a conviction under the constitution depends on what the witness said and not on what is in the complaint. The failure to attack the complaint does not justify the shift of position by this Court from operation of a sound truck to "loud and raucous noises."

The ordinance in question, *as construed and applied,* under the facts and circumstances and the evidence in the record, abridges Kovacs' right of freedom of speech—not on its face, but as construed and applied. The evidence merely discloses the operation of the sound device and nothing more. Patrolman Domanski's testimony is simply that he heard a sound truck broadcasting music and the man's voice [4]. That was all that was said by him. No reference was made by him to "loud and raucous noises", or to the volume of sound emitted. No other witness was produced by the city. Nothing whatsoever was said by anyone in the trial court concerning "loud and raucous noises" nor the volume of sound. No reference was made by the trial judge to "loud and raucous noises." No such finding was made by him [5]. He evidenced no concern with nor interest in the volume of sound emitted by appellant's sound truck.

Since there is no finding that there were "loud and raucous noises" and since the city failed to sustain its burden of proof (*Busey v. District of Columbia,* 78 U. S. App. D. C. 189, 138 F. 2d 592; *United States v. Carolene*

Products Co., 304 U. S. 144, 152; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638-640; *Thomas v. Collins*, 323 U. S. 516, 529-530) that there were "loud and raucous noises," upon the whole record, the conviction should be set aside because it is an abridgment of the right of free speech, under all the facts and circumstances of the case.

The conclusion reached by the Court, as expressed in the opinion of Mr. Justice Reed that Kovacs was convicted of emitting "loud and raucous noises" from his sound truck, is definitely erroneous.

We submit that the Court has overlooked the fact that a question to be determined is that the constitutional rights of Kovacs were deprived because of the manner in which the ordinance was construed and applied and enforced, under all the facts and circumstances disclosed in the evidence. In failing to consider whether or not the ordinance as construed and applied, has been used to unconstitutionally deprive Kovacs of his liberty and further that Kovacs was neither charged with, tried for nor convicted of broadcasting "loud and raucous noises" over his sound truck and that there was no evidence of the broadcasting of "loud and raucous noises," the Court has inadvertently reached the wrong conclusion.

Without detracting in the least from what we have previously stated herein, we feel that we must express the opinion that it is a dangerous and reactionary principle to rule out sound devices when found to be "loud and raucous." It should be noted that even the Chief Justice and the President of the United States were compelled to use a "loud and raucous" device at the recent inauguration ceremonies so as to be heard by the large audience on the Capitol grounds.

The dangerous effects of this decision on free speech and assembly cannot be minimized by saying that each case depends upon and must be decided according to its own facts. Courts and principles must be consistent to avoid confusion. There are no serious dangers here with which

the Court must concern itself. The slight inconvenience to the public and the police is not sufficient to tilt the scales of freedom and justice against free speech and assembly.

The decision is not at all realistic. While imagining dangers in favor of the police, the Court closes its eyes entirely to the fact that any person using a sound device can be convicted on the opinion of a policeman that it was "loud and raucous," or on a similar opinion of any one person hostile to the views expressed by the user of the sound device.

Little by little, the Court will, by such processes as are employed here, whittle away the pillars of the Bill of Rights and in the name of peace and quiet or of democracy leave this nation in a "police state" where, under the club of "loud and raucous" placed into the hands of an arbitrary police official, all attempts at the exercise of freedom of speech and assembly could be prohibited in public places.

The inconvenience of receiving a leaflet is not sufficient to suppress free speech on the streets. It too is forced on the public, if one finds he is not interested in the message. He may discard it. The inconvenience of listening to a sound device is no greater and is no stronger reason for stopping it. One can avoid listening if one so desires.

It is the function of judicial decisions to settle the law, not to compound confusion. The present status of this matter serves only to leave the law in confusion.

Three of the Justices—a minority—hold this ordinance to be a reasonable regulation of the use of sound amplifying devices. Six of the Justices deny that it is a reasonable regulation, but construe it to be an absolute prohibition of the use of such devices. Yet two of those six Justices—a minority—hold such ban to be permissible and vote with the finders of a "reasonable regulation" to affirm the conviction. Four Justices—still a minority—hold such ban to be unconstitutional. Where is Kovacs or any other person in such a picture? No consideration is given by the majority to the constitutionality of this ordinance as construed and applied to the facts and circumstances in this case and

no determination is made by it on that question. The opinion of the Court convicts appellant of a charge never made against him, on which there was no evidence submitted and of which he was neither tried nor convicted.

Five separate opinions are delivered by the Court. A majority of the Court does not agree on the determination of any one vital question raised in the case. How can Kovacs, or any other person, determine what rights are preserved to him and what rights are restricted or denied him? How can any municipality or other law enforcement official determine what comes within their police power and what is prohibited to them? Must a whole series of cases be brought before the Court before we can hope for some light out of the present confusion?

It is neither fitting nor proper that the Court permit the present situation resulting from the decisions here to continue.

CONCLUSION.

Wherefore appellant prays that the order and judgment heretofore entered herein, affirming the judgments of the Courts below, be set aside and held for naught, and that, on the briefs heretofore submitted and upon consideration of this petition, this motion for rehearing be granted and the Court render an order reversing the judgments of the Courts below or, in the alternative, order the cause to be reargued orally. Appellant prays for such other relief as he may show himself justly entitled to in the premises.

GEORGE PELLETTIERI,
Counsel for Appellant.

Certificate.

I, George Pellettieri, do hereby certify that the foregoing Motion for Rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

GEORGE PELLETTIERI,
Counsel for Appellant.